

RECENT SIGNIFICANT FEDERAL SECTOR EEOC DECISIONS

January 1999

*****CASES MARKED WITH AN ASTERISK WILL BE SPECIFICALLY DISCUSSED*****

1. COMPENSATORY DAMAGES

SUPREME COURT AGREES TO REVIEW EEOC'S POWER TO AWARD DAMAGES TO FEDERAL WORKERS

*****West v. Gibson, U.S., No. 98-238, cert granted 1/15/99.*****

The U.S. Supreme Court on January 15, 1999 agreed to decide whether the Equal Employment Opportunity Commission has authority to order federal agencies to award their employees compensatory damages for violations of Title VII of the 1964 Civil Rights Act. By granting review of a U.S. Court of Appeals for the Seventh Circuit decision holding that EEOC lacks such power, the Supreme Court will have an opportunity to resolve a split among the federal circuit courts on the extent of EEOC's remedial authority in the federal sector.

COMMISSION AWARDS \$125,000 IN NONPECUNIARY COMPENSATORY DAMAGES

*****Santiago v. Department of the Army, EEOC No. 01955684 (October 14, 1998)*****

The only issue on appeal was the amount of compensatory damages to be awarded. After a hearing, an EEOC Administrative Judge (AJ) found that because of sex, age and reprisal discrimination appellant was discriminated against by her supervisor from almost the start of her tenure in October 1989 to the time of her removal in February 1993. In particular, the AJ found that the supervisor publicly humiliated and berated appellant, called her derogatory and highly offensive names, and questioned her competence on almost a daily basis, often in front of other employees. For instance, the supervisor would stand over appellant while she worked, yell, and bombard her with sarcastic and crushing remarks. He frequently found fault in appellant's work and talked down to her in a rude and harsh tone. Further, when appellant asked for assistance, the supervisor would respond with "some debilitating remark" or just scream. His demeanor with appellant was described as intimidating and almost vengeful. The AJ found that this harassment continued until appellant was removed in February 1993. In a separate hearing on the issue of compensatory damages, the AJ found that the appellant was entitled to nonpecuniary damages "to the fullest extent permitted by law" for the emotional psychological distress and physical illness appellant sustained from November 21, 1991 to the date she was removed on February 12, 1993. In awarding these nonpecuniary damages, the AJ credited the opinion of appellant's treating psychologist that her emotional injuries were caused by the agency's actions, and credited the testimony of appellant and her husband that after the agency's actions appellant's life changed in that she became socially withdrawn, was very worried, and did not want to eat, and did not do

housework or cook. The AJ also found that appellant's pecuniary losses were caused by the agency (medical bills) and awarded her \$57.50. The AJ did not award her for medical/psychological expenses of appellant's private physicians outside of her health plan as these costs were incurred after appellant was removed. In a final decision (that did not give appellant appeal rights), the agency adopted the AJs finding of discrimination but did not agree with the AJs findings as to compensatory damages. In particular, the agency found that appellant sustained past pecuniary losses as a result of the discrimination and was entitled to reimbursement of the \$57.50 for her health plan. The decision found that appellant sustained nonpecuniary losses as well, but stated that the decision on the amount would be held in abeyance for 60 days. The agency also provided equitable remedies, including rescinding the removal action which was appealed to the MSPB. It provided appellant an opportunity to provide evidence on any compensatory damages associated with the removal. After the evidence was submitted, the agency awarded appellant \$85,000 for the emotional pain and suffering, mental anguish, marital strain, depression, isolation, and a variety of physical ailments (chest and stomach pains and digestive problems), but awarded her nothing for past or future pecuniary losses. The rationale was that the agency could not determine whether the past losses were covered by health insurance, and future losses were not sufficiently articulated or documented.

On appeal, the Commission found that as to **past pecuniary damages**, that appellant sustained among other things, emotional injury including depression and a variety of physical ailments such as chest and stomach pains and digestive problems.

In total the Commission awarded \$ 20,697.67 for past pecuniary damages.

- ! \$13,500—past pecuniaries for appellant's treating psychologist fees (\$150 weekly fee and \$1,500-- psychological testing)
- ! \$4,841.98—past pecuniaries for damages connected with private physician fees: between March and July 1993 appellant saw the doctor outside of her health plan 14 times for digestive problems and stomach pains. The agency deducted \$60.00 from the amount requested by appellant because it was for a broken appointment and the Commission found no nexus between that and the discrimination.
- ! \$196.00—for 784 miles in auto travel to and from the doctor at .25 per mile (official government travel rate at the time)
- ! \$273.50—past pecuniaries for testing procedures (gastro imaging and cardiac enzyme test) since these expenses were likely related to appellant's chest pain and digestive problems. The Commission did not approve \$44.75 for thyroid profile because lack of nexus.
- ! \$1,286.19—past pecuniaries associated with health insurance premiums paid after removal (includes deduction for the amount toward health benefits appellant would have paid if she were still employed at the time).

In total the Commission awarded \$16,800 for future Pecuniary Damages

- ! \$16,800.00—future pecuniaries for psychologist visits (110 visits at \$150 per visit based on the rate appellant saw the psychologist in the past)

In total the Commission awards \$125,000 for Nonpecuniary Damages

- ! Based on the testimony of co-workers who witnessed the harassment (regular screaming and other verbal abuse) and appellant's reaction to it (crying, depression, lack of interest in coming to work), and the testimony of appellant and her husband about appellant's change in mood, depression, marital stain and loss of marital relations, the Commission awarded \$125,000. The Commission noted there is not set formula, but looked to prior cases:

Carpenter v. Dept. of Agriculture, EEOC Appeal No 01945652 (July 17, 1995)—an award of \$75,000 in nonpecuniary damages for deterioration in appellant's medical and emotional condition resulting in his disability retirement. Aggravation of asthma, panic attacks, insomnia, digestive problems, loss of spirit, social withdrawal, feelings of hostility, irritability, loss of libido).

Finlay v. U.S. Postal Service, EEOC Appeal No. 01942985 (April 29, 1997) (award of \$100,000 in nonpecuniary damages for severe psychological injury over four years which was expected to continue for an indeterminate period of time. This included ongoing depression, frequent crying, concern for physical safety, recurring nightmares and memories of harassment, a damaged marriage, stomach distress, headaches).

FAILURE TO MITIGATE, PAY-BASED FORMULA, DISALLOWANCE OF COSTS CONSIDERED IN COMPENSATORY DAMAGES AWARD

Young v. Social Security Administration, EEOC Appeal No. 01955120 (January 30, 1998).

An Administrative Judge recommended finding that appellant was discriminated against on the basis of perceived disability in an April 1992 nonselection, and retaliated against in an August 1992 nonselection, and also found that appellant was entitled to compensation for some but not all of appellant's claimed pecuniary and nonpecuniary losses. She found entitlement for costs. The agency in its final decision accepted the recommendations of the AJ except for the payment of \$1,000 in costs. The agency excluded the cost of the psychological evaluation that appellant's psychologist conducted to prepare for testifying on appellant's behalf, on the grounds that the AJ had found that the psychologist's evaluation was of little evidentiary value. The agency's award totaled \$5,125. On appeal, appellant contended that the agency's award was merely token.

Some limits on the pecuniary damages were upheld by the Commission. The Commission agreed with the AJ that appellant failed to mitigate the damages she claimed for migraines, and observed that a complainant has a duty to mitigate his or her pecuniary damages under EEOC Guidance. The

Commission decided that appellant failed to mitigate her damages by failing to adhere to medical advice concerning stress reduction and a change in medication.

The Commission also limited nonpecuniary losses, but awarded a larger sum than was awarded by the agency. The Commission observed that in arriving at a portion of the nonpecuniary damages, the agency used a formula based on appellant's pay. The Commission does not adopt such a formula because the formula presumes that pain and suffering at lower pay levels are worth less. With respect to costs, the Commission restored the costs of the psychologist's evaluation. While recognizing the AJ's finding that the psychologist's testimony and opinion regarding appellant's depression was of limited probative value, the Commission pointed out that the finding was in the context of the psychologist's opinion as to whether the appellant was entitled to damages resulting from depression. Neither the credentials of the psychologist nor his expertise was ever questioned, stated the Commission. The Commission awarded a total of \$7,220 in compensatory damages.

COMMISSION UPHOLDS \$25,000 COMPENSATORY DAMAGES AWARD

Terrell v. Department of Housing and Urban Development, EEOC Request No. 05970336 (November 20, 1997).

Appellant alleged sex and age discrimination in his nonselection for the position of Equal Opportunity Specialist. An EEOC AJ issued a recommended decision on appellant's complaint, finding sex discrimination and also finding an entitlement to compensatory damages. Upon receiving the AJ's decision, the agency conducted a supplemental investigation. Even though the agency relied on information from the investigation in its final decision, which found no discrimination, the agency did not at that time inform appellant of the investigation. He did not learn of it until after he appealed. In the decision on appellant's appeal, the EEOC found that the agency acted improperly in conducting the supplemental investigation. The EEOC also agreed with the findings of the AJ and awarded appellant non-pecuniary compensatory damages for emotional harm in the amount of \$25,000. The agency filed a Request to Reconsider.

The Commission on reconsideration found that the investigation was improper. The Commission reasoned that if EEOC regulations had been followed, the agency would already have had ample opportunity to investigate the complaint and to submit relevant information at the hearing stage. In addition, the Commission expressed concern that to permit belated agency investigations such as this one would place appellants in an untenable position on appeals.

In its Request to Reconsider, the agency also challenged the amount of the compensatory damages award as excessive, but the Commission denied this challenge. The agency argued that the harm to appellant in this case was not as severe as the harm in another case for which the Commission awarded \$25,000 (Smith v. Department of Defense, EEOC Appeal No. 01943844 (May 9, 1996)). Specifically, the agency contended that the harm to appellant in this case was less because he was not hospitalized and the harm did not prevent him from working. The Commission observed that the agency failed to consider the "devastating effect" of the discrimination on appellant's marital and

familial relationships, and on his enjoyment of life and self esteem. The Commission also differed with the agency because several witnesses, credited by the AJ, testified to observations of manifestations of emotional harm, such as extreme introversion, sleep problems, and frequent crying. The Commission denied the agency's Request to Reconsider. The agency was directed to pay appellant compensatory damages in the amount of \$25,000, and to pay other specified relief for the discrimination.

White v. Department of Veterans Affairs, EEOC Appeal No. 01950342 (June 13, 1997).

The appellant, a food service worker at a medical center, alleged that he was subjected to unwelcome sexually suggestive remarks and gestures by his female supervisor. After rejecting her advances, he alleged that he was subjected to further harassment, including being assigned menial assignments and intensely critical scrutiny of his work performance. He stated that the work-related stress "took its toll," and that he began to see a psychologist. The psychologist diagnosed him with depression, including nervousness, fear and sleeplessness due to his treatment by his supervisor. An EEOC AJ found hostile environment harassment, and that the agency had failed to take prompt and effective action once it was on notice. The agency rejected the recommended finding of discrimination.

On appeal, the Commission affirmed the AJ finding of hostile environment harassment. As a remedy, it ordered the restoration of leave taken as a result of the harassment, in addition to compensatory damages. The appellant had submitted a billing statement from his psychologist in the amount of \$8,400 for individual sessions related to his psychological treatment. Observing that the sessions took place during the relevant time frame, the Commission awarded him the entire amount in pecuniary damages. In support of his claim for nonpecuniary damages, the appellant testified that he almost suffered a nervous breakdown. He submitted a statement from his psychologist stating that his treatment at work had caused him to suffer anxiety, depression, emotional fatigue and insomnia. Noting that this evidence established that the appellant had suffered harm and that it was causally related to the discrimination, the Commission found that he was entitled to an award of damages. The Commission reiterated the principle that there is no precise formula for determining an award of nonpecuniary damages, but that it should be limited to the amount necessary to compensate the complainant for the actual harm, even where the harm is intangible. After considering the nature and severity of the appellant's emotional distress, as well as awards of such damages in similar cases, the Commission determined that \$5,000 was an appropriate award of nonpecuniary damages. It pointed out that the evidence submitted by the appellant was "sparse," but also observed that the agency had not submitted any evidence to rebut either the appellant's testimony on this issue or the medical evidence.

April v. Department of Agriculture, EEOC Appeal No. 01963775 (June 5, 1997).

The appellant, an agency veterinarian, alleged disability (depression) discrimination when she was allegedly coerced into resigning from her job. She stated that her supervisor was aware of her disability and refused to accommodate her by allowing her to take leave without pay to seek medical treatment. She also alleged that she was misinformed as to her right to a reasonable accommodation

for her mental disability. The parties entered into a settlement agreement, in which the agency agreed to reinstate the appellant retroactively, with back pay, pay attorney's fees, and pay proven compensatory damages not to exceed \$30,000. The appellant was given 60 days to submit her claim for damages, and the parties agreed to cooperate in good faith to complete the implementation of the agreement. The appellant timely submitted her claim for damages, providing evidence in support of her claim, including affidavits from her and her mother, receipts for expenses, and statements from a treating psychiatrist and a social worker. Her submissions gave detailed information on medical expenses, moving expenses, lost earnings, and other expenses totaling over \$300,000. In addition, she claimed \$30,000 in nonpecuniary damages for severe emotional distress.

The agency failed to take any action on the appellant's claim for damages. The appellant's repeated requests for action, by phone and letter, were unsuccessful. Seventeen months after her timely submission, the appellant received a letter from the agency stating that her claim would be assigned to an investigator. The appellant filed an appeal with the Commission, seeking agency compliance with the settlement agreement. She requested that the Commission award her \$30,000 in compensatory damages, plus interest, and attorney's fees. During the pendency of the appeal, the agency issued a final decision on the appellant's claim for damages. It awarded her \$1,500 in nonpecuniary damages and \$8,028.10 in pecuniary damages, for a total award of \$9,528.10. The agency's decision contained the following acknowledgment of harm: "... we believe that [the appellant] has established that the alleged actions occurred, and that, as a result of these actions, she suffered emotional distress, worry and anxiety."

In its analysis, the Commission found that the agency breached the settlement agreement by failing to cooperate with the appellant in good faith implementation of the damages provision, by failing to award the proven claim for such damages, and by failing to acknowledge the appellant's entitlement to attorney's fees.

With regard to the agency's failure to timely implement the damages provision of the agreement, the Commission noted that there was no specific time frame for the agency to act on the appellant's claim for damages. The Commission pointed out, however, that the agency agreed to cooperate in good faith in implementing the agreement, and stated that, absent specific time frames, the terms of an agreement must nevertheless be fulfilled in a reasonable amount of time. Based upon the agency's failure to act between the appellant's submission in November of 1994 and the agency's final determination in July of 1996, the Commission found the agency in breach of the settlement provision requiring it to act in good faith to complete the implementation of the agreement.

In its treatment of the amount of damages to be awarded, the Commission first noted that the agency agreed to pay proven compensatory damages up to \$30,000, and that the appellant had submitted proof of damages for over \$300,000. The Commission stated that the appellant had submitted objective evidence (in the form of her own affidavit, her mother's statement, statements and bills from psychiatrists and a licensed social worker) that fully supported such an award of nonpecuniary damages. It observed that the appellant's symptoms of depression were considerably exacerbated by the agency's discriminatory actions, and she suffered emotional distress, humiliation, anxiety and embarrassment during the year following the incidents at issue. The Commission noted that the

appellant made 23 visits for psychiatric treatment during the one-year period following the incidents. The statements of the licensed social worker and a treating psychiatrist indicated that the appellant was being treated for major depression, and that her condition was exacerbated by the incidents at the workplace. The appellant's mother confirmed that the appellant was severely depressed due to her treatment at work, and that she suffered humiliation, embarrassment and distress as a result of the manner in which agency officials treated her.

In light of this evidence, the Commission found that the appellant was entitled to the full \$30,000 in damages. The Commission also found that the appellant was entitled to an award of interest for the agency's delay in paying proven compensatory damages. It ordered the agency to pay the \$30,000 in damages, plus interest accruing from September 1, 1994 (the date of the settlement agreement) until the date of payment. The Commission also ordered the agency to award reasonable attorney's fees for pursuing her claim for compensatory damages.

Mullins v. United States Postal Service, EEOC Appeal No. 01954362 (5/22/97).

The appellant alleged that she was subjected to sex discrimination, harassment and reprisal for testifying in a coworker's EEO complaint. Following an investigation and a hearing, the EEOC administrative judge found that the appellant was sexually harassed and subjected to unlawful retaliation. The administrative judge also found that the appellant was entitled to compensatory damages. The agency adopted the recommended finding of sex discrimination and retaliation. After considering the appellant's evidence of damages, the agency determined that she was entitled to \$1,000 for pain and suffering. The appellant appealed the agency's decision, arguing that she was entitled to at least \$899,562.

On appeal, the Commission focused exclusively on the agency's award of compensatory damages. The Commission denied the appellant's claim for future pecuniary damages, which was comprised of a claim for loss of future earnings, a potential claim for future medical expenses, and a claim for a loss of "personal household services" (she allegedly could perform only 20% of her household chores). With regard to the loss of future earnings claim, the Commission determined that the appellant's removal was not the subject of the complaint on appeal, and that therefore damages stemming from her eventual separation were not available. It advised the appellant that she may wish to bring the matter of her removal to the attention of an EEO Counselor if she wished to pursue the matter further. Concerning the appellant's potential claim for future medical expenses, the Commission noted that the appellant had not provided any evidence of the nature, extent or duration of her medical visits.

Demeuse v. United States Postal Service, EEOC Appeal No. 01950324 (5/22/97).

The appellant was a distribution clerk for the agency from 1987 until he took disability retirement in 1993. He alleged harassment due to his disability (post-traumatic stress syndrome) and constructive discharge. His complaint alleged that his privacy was violated when: a letter requesting accommodations was left out for others to see; he was called a "Rambo;" a supervisor "frisked" him for weapons while he was walking to his work area; and his request for overtime restrictions was not honored by the agency. He sought damages for mental stress. Noting the claim for damages, the agency requested that he provide objective evidence of damages. The appellant submitted an affidavit stating that the treatment he had received had exacerbated his post traumatic stress disorder and caused him to have suicidal thoughts. He stated that he had experienced crying spells, back strain, and an abnormal number of colds, flus and mouth sores. The agency issued a final decision finding no discrimination, which the appellant appealed to the Commission.

On appeal, the Commission found that the appellant was a qualified individual with a disability, in that he had a limitation which substantially limited one or more major life activities, and he could perform the essential functions of his position. The Commission found that the supervisor's action of "frisking" the appellant was related to his disability, and that the act of "frisking" him, for no apparent reason, was sufficiently severe to constitute harassment or a hostile environment based on mental

disability. The Commission further found that this act was not sufficiently severe to constitute constructive discharge. With regard to the appropriate remedy, the Commission noted that the appellant had suffered embarrassment and humiliation due to the "frisking" incident. The Commission found that the appellant had shown that he had suffered emotional distress as a result of the discriminatory incident. Noting that there are no definitive rules governing the amount of damages to be awarded, the Commission observed that the amount should not be "monstrously excessive, and that it be consistent with awards made in similar cases. Based on similar cases, and on the nature and severity of the harm to the appellant in this case, the Commission awarded him \$1,500 in compensatory damages. The Commission also ordered the agency to consider training officials at the affected facility in their responsibilities under the Rehabilitation Act.

Finlay v. United States Postal Service, EEOC Appeal No. 01942985 (4/29/97).

The appellant filed a complaint alleging hostile environment sexual harassment. Following an investigation and a hearing, an EEOC administrative judge (AJ) recommended a finding of discrimination. The hostile work environment was found to have been caused by the appellant's male coworkers repeatedly uttering comments of a sexual nature and utilizing sexually graphic language. The AJ found that the agency had failed to take corrective, curative and preventive action after being put on notice that sexual harassment was occurring. The appellant's physician found her to be totally disabled for work. The appellant was diagnosed with post-traumatic stress disorder and major depression, which were accepted as work-related by the Office of Workers' Compensation Programs (OWCP). Several months after filing her formal complaint, the appellant began receiving workers' compensation benefits. As a remedy, the AJ recommended back pay, front pay, attorney's fees, pecuniary and nonpecuniary damages, and corrective action to ensure that sexual harassment would not recur. The agency adopted the AJ finding of discrimination, but modified the scope of the recommended remedy. It rejected both back pay and front pay, but awarded \$25,000 in nonpecuniary compensatory damages. The appellant challenged the remedy in an appeal to the Commission.

The Commission rejected the agency's argument that the appellant was not entitled to an award of back pay because she was receiving workers' compensation benefits under the Federal Employees' Compensation Act (FECA). The Commission held that FECA benefits were not an exclusive remedy for losses caused by unlawful discrimination, but that the agency was entitled to offset the amount of wage-replacement benefits paid under FECA against the amount of back pay to which the appellant was entitled. Similarly, the Commission held that FECA was not the appellant's exclusive remedy with regard to front pay. The Commission concluded, however, that front pay was not available because the medical evidence established that the appellant was not able to work, and therefore was not available for work.

With regard to the remedy of compensatory damages, the Commission concluded that, based on the testimony of the appellant, her husband, her physician (a clinical psychologist) and another physician (a psychiatrist to whom the appellant was referred by OWCP for examination and evaluation), the appellant was entitled to an award of damages because she had shown that she had suffered emotional

harm and that it was causally related to the sexual harassment. The appellant testified that she felt "dirty" and "violated" by the events at the workplace, and that she was concerned about the physical safety of herself and other females in the workplace. Her husband testified that the appellant used to "love her job," but that after the discrimination began she was miserable, upset and cried, and that she "couldn't stand to go to work in the morning." He further testified that she had become lethargic, depressed, and that their marital relationship had become strained. The appellant's physician diagnosed her with post-traumatic stress disorder, major depression, and severe stress. The physician stated that the appellant cried frequently, displayed physical symptoms including headaches, stomach distress and fatigue, was estranged from her husband, and had difficulty concentrating. He offered his opinion that the appellant's reaction to the discriminatory environment would have been less severe if the agency had been responsive to her concerns. He stated that he did not know when she would be able to return to work, and that exposure to the same environment which caused her condition would make it worse.

In its determination of the amount of compensatory damages payable, the Commission first addressed the agency's argument that past and future pecuniary damages in connection with the appellant's psychotherapy were not available because such expenses were payable, and had been paid, under FECA. Noting that under FECA funds are disbursed by the OWCP, which is then reimbursed by the agency, the Commission found that the source of funds used to pay the appellant's past and future medical expenses was not collateral to the agency, and could therefore be used to offset the pecuniary damages which might otherwise be recoverable. The Commission distinguished this situation from one in which health insurance benefits funded by employer-paid premiums are collateral source funds, and not subject to offset. Accordingly, the Commission denied the appellant's request for past pecuniary damages for psychotherapy, since the medical expenses were payable under FECA, which was not a collateral source of funds. The Commission also denied the appellant's request for future pecuniary damages for psychotherapy expenses, again because these expenses are payable under FECA, which is not a collateral source of funds.

With regard to the appellant's request for future pecuniary damages for loss of wages, the Commission observed that the appellant was currently unable to work. Given that the appellant had no wage-earning capacity, the Commission found that she was entitled to future pecuniary damages in an amount sufficient to compensate her for future loss of pay and benefits. In order to avoid double recovery, the Commission stated that the amount of future pecuniary damages must be offset by the amount of any wage-replacement benefits received pursuant to FECA. The Commission noted that the record did not contain adequate information for a determination of the exact amount of such damages, but that the appellant's recovery could not exceed the statutory cap of \$300,000, less the amount of non-pecuniary damages also awarded. In its order, the Commission directed the agency to commence payment of future pecuniary damages, offset by the amount of any wage-replacement benefits received under FECA. The order indicated that the payment of such future pecuniary damages could not exceed \$200,000 (the statutory cap of \$300,000 less the \$100,000 awarded as non-pecuniary damages).

In its consideration of the amount of non-pecuniary damages to be awarded, the Commission first

stated that there are no "hard and fast" rules governing this determination, but that such a determination should take into account the severity of the harm and the length of time the injured party has suffered from the harm. After considering several recent administrative decisions awarding compensatory damages, the Commission determined that the appellant was entitled to non-pecuniary damages in the amount of \$100,000. The Commission specifically noted that this amount took into account the severity and duration of the harm done to the appellant, in that she had sustained a severe psychological injury which had affected her for four years at the time of judgment, and was expected to affect her for an indeterminate amount of time in the future. The agency was ordered to pay the non-pecuniary damages within 30 days of the date the decision was final.

Luellen v. United States Postal Service, EEOC Appeal No. 01951340 (December 23, 1996).

Appellant was a Mail Handler when, in 1985, he sustained a head injury. He was diagnosed with optic neuropathy vision in his left eye and experienced symptoms of headaches and blurred vision. Appellant was subsequently placed on work restrictions. He was precluded from being exposed to noise levels greater than 50 decibels. In 1992, once appellant had undergone rehabilitation, the agency offered him a modified Mail Handler position. The primary duties were in the Company Store, but the offer also informed appellant that he might be required to perform in the Safety/Health and other offices as well. Appellant's primary physician certified the position as medically suitable. Appellant had worked in that position for five months when he received a letter from an agency official directing him to report to the Safety/Health office and informing him that his reassignment was because the Store had less work than expected. The letter assured appellant that the new assignment was within his medical restrictions. Appellant objected on the grounds that his physician had not seen or evaluated the new location, and the physician wrote the agency that appellant would not return to work until the situation was clarified. He filed an EEO complaint alleging disability discrimination.

At the hearing on appellant's complaint, the agency was unable to prove that it had taken noise level measurements in the Health/Safety office before assigning appellant there. It did, however, show that other efforts had been made to reduce the noise level, including removing a buzzer from an elevator and a bell from a telephone, taping an air duct, and partitioning off his desk area. In addition, the presiding EEOC Administrative Judge noted the agency's efforts to identify and make reasonable accommodations for appellant's impairment, by consulting with appellant, his physicians, and with a rehabilitation counselor. The Administrative Judge issued a decision recommending a finding of disability discrimination, as the agency's efforts were insufficient to accommodate appellant's disability. The Administrative Judge stated that the efforts did establish that the agency made a good faith attempt to accommodate appellant's disability, and thereby precluded an award of compensatory damages. The agency did not accept the finding of discrimination and issued a final decision of no discrimination which appellant appealed.

On appeal, the Commission decided that, without conducting noise level readings before reassigning appellant, the agency did not provide reasonable accommodation. The Commission therefore found

that appellant was subjected to disability discrimination. Although appellant contended he was entitled to compensatory damages, the Commission decided that under Section 102 of the Civil Rights Act of 1991, the agency was not liable for compensatory damages. The Commission agreed with the Administrative Judge's finding that the agency's efforts constituted a good faith effort to accommodate appellant, and that therefore the agency was not liable for compensatory damages. The agency was directed to place appellant in an appropriate position, award him back pay, interest, and benefits, conduct training for the responsible officials, and post a notice at the subject facility.

Bever v. Department of Agriculture, EEOC Appeal No. 01953949 (Oct. 31, 1996).

The appellant filed a complaint alleging discrimination on the bases of sex, national origin (Greek), and reprisal for prior EEO activity when she was denied a promotion. The agency and the appellant subsequently entered into a settlement agreement, which provided, in pertinent part, that the agency would promote the appellant and "pay proven compensatory damages not to exceed fifty thousand (50,000) dollars." The appellant submitted a claim for \$50,000, detailing her emotional pain and suffering. She submitted a letter from her physician stating that she suffered from situational anxiety as a result of her hostile work environment, for which he prescribed medication. The appellant also submitted a letter from a coworker, noting that the appellant's work performance was less effective since the events at issue, and that she lost her composure and cried on several occasions. She submitted letters from several friends and family members, all attesting to the deterioration of the appellant's self-esteem and physical health as a result of her working conditions. Finally, she submitted numerous medical bills for various treatments over the relevant time period. After reviewing the documentation, the agency concluded that the appellant was not entitled to compensatory damages.

On appeal, the Commission noted that the recovery of compensatory damages in this case was limited to those damages shown to be causally connected to the incidents raised in the appellant's complaint, which was settled by the agreement at issue. The Commission found that the statements and evidence submitted by the appellant established that she had suffered harm and that it was causally related to the agency actions at issue. As a result, the Commission found that the appellant was entitled to an award of compensatory damages. In determining the amount of damages to be awarded, the Commission first noted that a complainant may recover out-of-pocket expenses incurred as a result of intentional discrimination. The Commission awarded the appellant a total of \$110 for medical expenses which she proved were incurred as a result of the agency actions at issue. Other monetary losses claimed by the appellant, including losses resulting from the dissolution of her marriage, the capital gains tax on the sale of her house, auto repair expenses and attorney's fees related to the dissolution of her marriage were denied by the Commission for failure to show that the losses were causally related to the agency actions at issue.

With regard to the non-monetary losses claimed by the appellant, the Commission noted that there were no definitive rules governing the amount to be awarded, but that such an award should take into account the severity of the harm, the length of time the appellant suffered, and that the award should

be consistent with the amounts awarded in similar cases. The Commission determined that the appellant was entitled to non-monetary damages in the amount of \$15,000. It noted that the appellant's physician had directly linked her condition of situational anxiety to the hostile work environment, that she was required to take medication (mood elevators) as a result thereof, and that her symptoms included uncontrolled crying, weight loss, and depression. The Commission therefore reversed the agency's decision and ordered it to pay her a total of \$15,110 in compensatory damages.

Falks v. Department of the Treasury, EEOC Request No. 05960250 (September 5, 1996).

Appellant alleged in an EEO complaint that the agency retaliated against him for prior EEO activity by giving him a lower than expected performance evaluation and by requiring him, in a memorandum, to submit his work for supervisory review. The prior EEO activity was a complaint brought under the ADEA. The agency dismissed appellant's complaint as moot, stating that both the performance evaluation and the memorandum in question had been destroyed. However, on appeal the agency's dismissal was reversed and the complaint was remanded for processing. The appeal decision pointed to compensatory damages claims in the complaint, and stated that appellant's entitlement to compensatory damages could not be addressed until appellant was given a full opportunity to present evidence of such damages.

The agency petitioned for clarification of the appeal decision, asking whether it was obligated to investigate the issue of compensatory damages, where the retaliation complaint at issue was based on an underlying ADEA complaint. The Commission viewed the agency's petition as more in the nature of a request to reconsider the previous decision, and decided to address the agency's question because of its substantial precedential implications. The Commission reviewed the federal sector portion of the ADEA, which is found at 29 U.S.C. § 633a, and the scope of Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a, which governs claims for compensatory damages in employment discrimination cases. It noted that it had previously held that, due to the lack of any waiver of sovereign immunity in Section 633a of the ADEA, compensatory damages were not available for federal sector claims of age discrimination. The Commission analogized to its decisions holding that, because Section 633a of the ADEA does not provide for attorney's fees, agencies are not obligated to award attorney's fees for retaliation complaints where the prior EEO activity arose under the ADEA. In this case, the Commission decided that, as with attorney's fees, there has been no waiver of sovereign immunity permitting an award of compensatory damages where a retaliation complaint is based on an underlying ADEA complaint. Since the agency's dismissal for mootness was therefore unaffected by appellant's claim for compensatory damages, the Commission affirmed the dismissal.

Lawrence v. United States Postal Service, EEOC Appeal No. 01952288 (April 18, 1996).

Appellant filed a complaint of hostile environment sexual harassment. The alleged harasser was a

part-time supervisor with whom she had engaged in a consensual relationship. After the relationship ended, appellant alleged, the harassment began. She filed her complaint after an incident involving an exchange of profanity between herself and the supervisor. After an investigation and a hearing, the agency issued a final decision in which it found hostile environment sexual harassment and authorized an award of compensatory damages. The decision directed appellant to provide the agency with information in support of her claim.

The agency provided appellant with a list of questions to answer relative to her request for damages. Appellant responded to the agency's questionnaire in a sworn statement. She described the emotional and psychological impact of the offending supervisor's conduct and the agency's failure to stop him. She acknowledged that she did not seek psychiatric or psychological counseling or therapy. The agency then issued a second final decision in which it ruled that appellant was not entitled to compensatory damages. The agency noted that appellant presented no evidence from a psychiatrist, psychologist or other medical official which explained or diagnosed her emotional distress. The agency further noted that appellant failed to present evidence establishing a causal connection between the supervisor's conduct and her purported emotional distress. Appellant appealed this decision to the Commission.

The Commission stated that evidence used to assess the merits of a request for compensatory damages may include statements from the claimant and from witnesses which include detailed information on physical or behavioral manifestations of emotional distress. It also stated that appellant should provide evidence linking her emotional distress to the agency's acts of discrimination. Such evidence may include statements from the claimant, from witnesses and from medical professionals. It may also include documentation of out-of-pocket expenses related to the injury allegedly caused by discriminatory actions taken by agency officials. The Commission stated, however, that neither evidence from a health care provider nor expert testimony in general is a mandatory prerequisite for recovery of compensatory damages for mental and emotional distress. It emphasized, however, that the absence of supporting evidence may affect the amount of nonpecuniary damages deemed appropriate in specific cases.

The record established that appellant and the supervisor had previously engaged in a consensual relationship, and that the supervisor began to harass her after the relationship ended. Appellant's sworn statement indicated that she suffered from weight loss, nausea, stomach problems and headaches as a result of the supervisor's conduct and comments. She also indicated that she had to use sick leave, that her work performance declined due to her inability to concentrate, that she was irritable and that she experienced anxiety attacks. In addition, she testified that her co-worker's shunned her after the supervisor made false statements about her in public. At the hearing, several witnesses testified that the supervisor's conduct caused appellant to suffer embarrassment and humiliation. One witness testified that the supervisor's conduct made appellant upset and nervous. Another testified that appellant appeared distraught after a particular incident. Yet another witness testified that appellant cried in his office right after an incident of harassment.

The Commission determined that the evidence that appellant presented was sufficient to establish a

causal connection between her emotional injuries and the supervisor's conduct. Despite appellant's admitted partial responsibility for the incident which led to her filing a complaint of discrimination (a mutual exchange of profanity at work), the Commission found that she was entitled to an award of compensatory damages.

The Commission stated that, in determining the amount of compensatory damages to be awarded for emotional distress, awards should be limited to the sums necessary to compensate the claimant for actual harm caused by the agency's conduct. It noted that, although there are no rules governing the determination of the appropriate amount, awards should not be monstrously excessive and should be consistent with awards made in similar cases. Based upon these principles, and taking into account the nature and severity of harm to appellant, as well as the actual duration of the harm, the Commission authorized an award of \$3,000 in compensatory damages.

Wallis v. United States Postal Service, EEOC Appeal No. 01950510 (November 13, 1995).

Appellant filed a complaint in which he alleged that the agency discriminated against him on the basis of reprisal by suspending him for seven days, placing him on administrative leave and reprimanding him. Pursuant to a hearing on the matter, an administrative judge found that appellant had been retaliated against, and recommended an award of compensatory damages. The amount of that award would be determined after appellant submitted additional information. The agency subsequently issued a final agency decision denying appellant's claim for compensatory damages on the grounds that the evidence submitted failed to establish the requisite causal connection between the acts of reprisal and the harm suffered.

The Commission found that appellant had produced substantial evidence of causation in support of his claim for compensatory damages. He submitted extensive and detailed statements from his treating psychiatrist indicating that he had experienced symptoms of depression which had progressively worsened to the point at which he had to take anti-depressive medication. The psychiatrist also related how appellant's feelings of frustration and persecution had become more intense. The Commission found that the evidence was sufficient to support a finding that the agency's acts of reprisal substantially contributed to the worsening of appellant's mental condition.

The Commission stated that in calculating the damages award, application of the collateral source rule is appropriate. Under the collateral source rule, benefits received by a plaintiff from a source collateral to the defendant may not be used to reduce the defendant's liability for damages. It also stated that fringe benefits of employment, such as health insurance benefits, constitute collateral sources. It determined that appellant's health insurance plan constituted a collateral source, and consequently, that any payments made by the insurer on appellant's behalf could not be used to reduce the compensatory damages award.

The Commission found that appellant was entitled to an award of \$60,142.40, broken down as follows: \$1,690.40 for expenses already incurred with respect to office visits to the psychiatrist and

prescription drugs; \$8,452 for office visits and prescription costs to be incurred over the next five years; and \$50,000 for pain, suffering and emotional distress. The Commission entered an order directing the agency to pay this amount.

Compensatory Damages Available Only for Discrimination Occurring After November 21, 1991

Adesanya v. United States Postal Service, EEOC Petition No. 04950026 (February 15, 1996).

Petitioner filed a complaint on November 18, 1991, in which she alleged that the agency discriminated against her on the bases of race (inter-racial marriage) and sex (pregnancy) when it informed her that there was no work available within her medical restrictions. After an agency investigation and hearing, an administrative judge recommended a finding that the agency discriminated against petitioner on the basis of her pregnancy when it failed to provide her with light duty work between August of 1991 and April of 1992, when she was pregnant. The judge also recommended that petitioner be awarded back pay during the period in question. The agency adopted the administrative judge's recommendation as its final decision.

Petitioner filed an appeal concerning the remedy set forth in the final decision. She contended in particular that she was entitled to compensatory damages. In its initial decision, the Commission ordered the agency to conduct a supplemental investigation on petitioner's claim for compensatory damages. In its supplemental investigation report, the agency stated that petitioner failed to respond to its request for information pertaining to her damages claim. The agency noted that petitioner did not provide medical bills, receipts or any other statements reflecting manifestations of emotional distress. Petitioner stated in her petition for enforcement that she provided a copy of a letter from her husband dated September 20, 1991, addressing the problems occasioned by petitioner's exclusion from work.

The Commission found that the agency failed to comply with its order to investigate petitioner's claim for compensatory damages. The Commission noted that the agency gave petitioner an insufficient amount of time to respond to its request for information (6 days). The Commission noted that petitioner must provide information specifically pertaining to that portion of the relevant period for which she may seek compensatory damages, between November 21, 1991 (the effective date of the Civil Rights Act of 1991), and April 1992. It emphasized that, in cases such as this, where there is a violation that begins before November 21, 1991 and continues afterward, damages may only be sought for conduct which occurred after that date. The Commission further noted that evidence of discriminatory acts occurring before the effective date of the Civil Rights Act of 1991 was relevant in assessing the extent of post-Act injury.

Compensatory Damages Not Available for Claims of Settlement Breach

Berendsen v. Department of Agriculture, EEOC Request No. 05950488 (March 1, 1996).

Appellants, husband and wife, filed a complaint in which they alleged that the agency discriminated against them on the bases of sex, national origin (Hispanic) and reprisal. The parties entered into a settlement agreement on March 15, 1993, providing that the agency would transfer them, change their ratings, restore any annual and sick leave taken, pay them a lump-sum and take other corrective action.

In January of 1994, appellants submitted a letter requesting that the agency reinstate their complaint, on grounds that the agency failed to comply with the terms of the settlement agreement. The agency issued a final decision denying appellants' request to have their complaint reinstated, which they appealed to the Commission.

On appeal, appellants asked for compensatory damages which they alleged were caused by the agency's breach of the settlement agreement. In this regard, the Commission observed that the agreement did not provide for an award of compensatory damages. Moreover, the Commission explicitly held that compensatory damages are not available for the breach of a settlement agreement. The Commission affirmed the agency's final decision.

Claims for Compensatory Damages Cannot Be Dismissed Under 29 C.F.R. § 1614.107

Campbell v. Department of the Navy, EEOC Appeal No. 01954935 (July 8, 1996).

Appellant filed a complaint setting forth ten separate allegations of discrimination based on race, sex, disability and reprisal. She requested all forms of appropriate relief, including compensatory damages. The agency accepted one allegation, and asked appellant to provide evidence to support her claim for damages. After appellant responded initially, the agency asked for additional clarifications. The agency's letters informed appellant that failure to respond within thirty days could result in her claim for damages not being processed. When appellant failed to provide all of the requested information within the designated time frame, the agency issued a final decision dismissing appellant's request for compensatory damages. That decision also indicated that the agency would continue to process the remainder of the complaint.

The Commission found that the agency improperly dismissed appellant's claim for damages. It emphasized that compensatory damages are a remedy, and that where the agency had accepted a complaint, it need not determine entitlement to compensatory damages unless discrimination was found. It reiterated that a claim for compensatory damages could only be denied at the appropriate stage of the process, and could not be dismissed under 29 C.F.R. § 1614.107. The Commission vacated the agency's final decision and ordered the agency to process appellant's claim for damages as part of the complaint.

OFFER OF \$500 FOR NON-PECUNIARY COMPENSATORY DAMAGES INSUFFICIENT

Voisine v. Department of the Navy, EEOC Appeal No. 01961565 (September 11, 1997).

Appellant, the only female employee on the second shift at a naval shipyard, had filed an EEO complaint alleging harassment on the basis of her sex when on two occasions she found material she believed offensive in the women's restroom. She sought reimbursement for 44 hours of leave she used after the first incident, medical expenses, and attorney's fees. Approximately six months after the second incident, in July 1995, appellant ceased coming to work.

Early in the investigation of her complaint, the agency informed appellant that the investigation would be stopped and that the agency intended to issue her an offer of full relief. At the agency's request, appellant submitted documentation in support of her claim for damages. Included were two letters from her physician and appellant's personal statement. Her physician's letters referred to appellant's mental and emotional stress, as did appellant's statement. The physician in a letter dated shortly after appellant stopped working asked that appellant be placed on "workers compensation leave of absence due to her mental and emotional stress...a consequence of sexual harassment at her work site." Appellant made the statement that she was unable to return to work, and had a setback emotionally, upon learning that the investigation was being canceled.

The agency issued appellant a certified offer of full relief to resolve her complaint. The agency offered, among other things, reimbursement of the 44 hours, and nonpecuniary damages in the amount of \$500 for emotional pain and suffering for the period after the first incident. The agency denied reimbursement for the unpaid absence beginning in July 1995 on the grounds that appellant failed to show a nexus between her absence and the incidents cited in her complaint. Appellant refused the offer, the agency dismissed her complaint, and appellant appealed. In its appeal decision, the Commission stated that the agency's offer did not constitute full relief. A valid offer must provide relief to all of the existing allegations of a complaint, stated the Commission, because a valid offer must be based on the assumption that the agency discriminated against the complainant as she had alleged in her complaint. In this case, the Commission noted the above-quoted doctor's statement in deciding that the \$500 offer was insufficient. The Commission vacated the agency's dismissal, and remanded the complaint for processing.

2. SANCTIONS AND ADVERSE INFERENCES

COMMISSION AFFIRMS SUMMARY JUDGMENT FINDING OF DISCRIMINATION BY ADMINISTRATIVE JUDGE BASED ON ADVERSE INFERENCE.

*****Sampson v. Department of Justice, EEOC Request No. 05960435 (August 13, 1998)*****

Appellant alleged that she was subjected to sex discrimination when she was not selected for two positions for which she had applied. Following the agency's investigation appellant requested a hearing before an EEOC Administrative Judge (AJ). Prior to the hearing, appellant made a motion for the AJ to draw an adverse inference ruling against the respondent agency for its failure to provide key documents regarding the selections. The record showed that, aside from submitting the vacancy announcements for the challenged selections, the agency had failed to provide any documents normally associated with a selection process, such as application packages of the applicants,

documents from the ranking panel, questions asked or notes of the screening panel or selecting official, interview notes or other comparative notes of the candidates from the selecting official, or any other documents related to the selection process. The agency responded that the requested documents either did not exist or were not in its possession. After holding an emergency hearing on the matter, the AJ determined that the agency had no explanation for most of the missing documents. The AJ noted that the agency's investigative file was "severely lacking" documents which appeared to be crucial to a fair presentation of the case. The AJ found that the agency had failed to show good cause for its failure to maintain information relevant to the complaint, and determined that the imposition of an adverse inference was proper. The AJ recommended a finding in favor of appellant, including an award of full relief. The agency rejected the AJ's recommendation and issued a final decision finding no discrimination.

On appeal, The Commission found that the AJ had properly drawn an adverse inference from the agency's failure to show good cause for not preserving documents relevant to appellant's complaint. The complaint was remanded for a hearing. Appellant requested reconsideration which the Commission granted. The Commission reversed the previous decision's order for a hearing, reasoning that no purpose would be served by a hearing since the agency had consistently denied having the appropriate and necessary documentation, and had failed to provide any reasonable evidence to permit a fair presentation of the case. The Commission also noted that once an EEO complaint is filed in connection with a nonselection, an agency is obligated to retain all relevant records concerning the challenged process. The Commission concluded that the AJ had properly exercised his discretion in imposing an adverse inference and finding in appellant's favor as a result thereof. As a remedy for the discrimination against the appellant, the Commission ordered the agency to offer appellant the supervisory position she had sought, and to pay her back pay.

AGENCY SANCTIONED FOR REFUSAL TO PROVIDE RELEVANT EVIDENCE

Jackman v. Department of Housing and Urban Development, EEOC Request No. 05970011 (January 16, 1998).

Although the agency had provided unsanitized Standard Form (SF) 171s during its initial investigation of appellant's EEO complaint, it produced only sanitized SF 171s during the supplemental investigation ordered by an EEOC AJ. All of the SF 171s pertained to the nonselection which appellant, in his complaint, alleged were based on age, sex, and race discrimination. After reviewing both the sanitized and the unsanitized versions of the SF 171s proffered in the supplemental investigation, the AJ ordered the agency to provide appellant with versions significantly less sanitized than the agency had previously provided. The AJ told the agency that information such as social security numbers and home addresses could be sanitized, but that age, experience, and education data in the documents were relevant and should be disclosed. The agency refused. On the day of the hearing, the AJ decided not to go forward, in part because of the agency's refusal. Ultimately, the AJ issued a recommended decision without a hearing, which sanctioned the agency by prohibiting it "from using comparative evidence of other candidates as a defense." As the agency was unable to

articulate a legitimate nondiscriminatory reason for not selecting appellant, the AJ found age discrimination as to one of the nonselection. (The sanction was not relevant to two other positions because appellant did not establish his *prima facie* case.) The agency issued a final decision of no discrimination as to all nonselection, and appellant appealed.

The appellate decision found the sanction proper, the agency's sanitizing of age, experience, and education data improper, and noted that even absent the sanction, it would have found discrimination. The agency filed a request to reconsider, arguing that the AJ exceeded her authority and improperly imposed the sanction. The Commission determined that the AJ's sanction was proper. In addition, the Commission noted that the agency wanted the AJ to ask questions during the hearing and determine "piecemeal" whether certain applications were relevant. The Commission agreed with the AJ that appellant was entitled to the minimally sanitized SF 171s prior to the hearing. The Commission also found no error in the findings of the appellate decision. The agency's request was denied.

ATTORNEY'S FEES AND COSTS AWARDED AS SANCTION FOR FAILURE TO TIMELY COMPLY WITH EEOC ORDER

Williams v. Department of Veterans Affairs, EEOC Petition No. 04960024 (July 11, 1997).

Petitioner filed a complaint alleging race discrimination and reprisal when she was subjected to adverse treatment during her probationary period and subsequently terminated. She appealed the agency's finding of no discrimination to the Commission. The Commission found the record insufficient to support a decision on the merits, and remanded the matter for a supplemental investigation. The Commission's order, dated August 23, 1995, specified that the supplemental investigation and issuance of a final decision be completed within sixty calendar days. On March 28, 1996, petitioner notified the Commission that the agency had failed to complete the supplemental investigation and issue a final decision as required by the Commission's order. The petitioner asked the Commission to enforce its order. The Commission noted that the agency had failed to comply with its order within the specified time period. The record showed that the agency had not completed the supplemental investigation and issued a final decision until June 27, 1996. The agency's delay in compliance, the Commission stated, resulted in the petitioner's having retained counsel in order to pursue the petition for enforcement. Due to the agency's failure to comply with the time limits set forth in its order, the Commission found that the petitioner was entitled to be reimbursed for any attorney's fees and costs incurred in processing the petition.

Velasquez v. Department of Justice, EEOC Petition No. 04960018 (Feb. 28, 1997).

A petition was filed with the Commission to enforce an EEOC order in a previous appeal decision. The Commission had reversed the agency's dismissal of portions of the petitioner's complaint and remanded the allegations for processing. The Commission's order, issued October 30, 1995, directed

the agency to provide a copy of the investigative file to the petitioner and notify her of the appropriate rights within 150 days. In a petition for enforcement dated March 27, 1996, the petitioner asserted that the agency had not provided her with a copy of the investigative file or notified her of the appropriate rights.

In its decision on the petition for enforcement, the Commission first noted that its previous order giving the agency 150 days to comply began to run on October 30, 1995, the date of the remand order. The agency was obligated to have completed the investigation and have submitted a copy of the investigative file to the petitioner by March 28, 1996. The record showed that by letter dated September 12, 1996, the agency transmitted the investigative file and appropriate hearing rights to the petitioner. The Commission observed that, despite the petitioner's request dated October 7, 1996 for an immediate final decision, the agency had still not issued a final decision in the matter. The Commission stated that the time limitations set forth in Commission orders are mandatory and binding, not advisory in nature. It therefore granted, in part, the petition for enforcement, finding that the agency had failed to complete the investigation and issue its decision within the time frames ordered. The Commission ordered the agency to issue a final decision within 10 days of its receipt of the decision on the petition for enforcement. It also determined, in light of the agency's repeated delays in implementing the Commission's prior order, that the petitioner was entitled to be reimbursed for attorney's fees and costs which she may have incurred in the processing of the petition for enforcement. The Commission stated that such an award was appropriate because the petition for enforcement was a reasonably foreseeable consequence of the agency's noncompliance with the Commission's order.

Attorney's Fees and Costs Ordered Against Agency as Sanction for Failure to Appear at Scheduled Deposition.

Comer v. Federal Deposit Insurance Corp., EEOC Request No. 05940649 (May 31, 1996); agency's subsequent reconsideration request denied, EEOC Request No. 05960677 (3/26/98). The appellant filed a complaint alleging sex discrimination when she was not selected for a management position. She further alleged that the grade level of the position for which she was not selected was lowered in order that a male candidate who was otherwise ineligible could be transferred to the position. Following the agency's investigation, the appellant requested a hearing before an EEOC AJ. Prior to the hearing, the record showed that the agency failed to appear for properly scheduled depositions. Due to the agency's failure to appear, the appellant filed with the AJ two motions to compel depositions, as well as a subsequent request for sanctions for failure to appear. Among the sanctions requested by the attorney was to be reimbursed for costs incurred from the agency's noncompliance.

In her Order, the AJ noted that the record showed that appellant's counsel attempted to contact the agency and arrange for depositions, and that the agency failed to respond in a timely manner, including failing to appear rather than timely contacting the appellant's attorney to reschedule the properly noticed depositions. For example, the record contained an affidavit from the appellant's attorney stating that he noticed the deposition of two witnesses (agency employees) on a particular

date. The attorney testified that although the agency did not inform him at any time that it did not intend to appear for the depositions, the agency failed to appear. The AJ found that the agency's refusal to contact the appellant's attorney in a timely manner constituted bad faith. As a sanction for the agency's failure to comply, the AJ excluded certain evidence offered by the agency, but she denied the appellant the costs incurred as a result of the noncompliance, concluding that she was not authorized to award monetary sanctions. Despite the exclusion of certain evidence, the AJ concluded that the appellant had not been the victim of discrimination. The agency adopted the AJ's finding of no discrimination. On appeal, the appellant asked the Commission to issue an order compelling the agency to compensate her for the expenses and attorney's fees which she incurred from the agency's bad faith conduct, irrespective of the decision on the merits of her complaint.

On appeal, the Commission affirmed the AJ and agency findings of no discrimination. With regard to the monetary sanctions requested by the appellant, however, the Commission disagreed with the position that such sanctions were not available. Citing Chapter 6 of its Management Directive 110, the Commission noted that the directive specifically states: "A failure to appear at a properly scheduled deposition may result in the non-appearing party bearing the cost of the missed session. For the purposes of this section, any employee or former employee of the agency currently employed by the Federal government is a party. Agencies must make such persons available for depositions and such depositions shall be taken on official time. The agency may be liable for costs incurred if such persons are not made available on the clock for depositions or other discovery or if such persons fail to appear." The Commission concluded that, to the extent that the appellant incurred costs, including attorney's fees, as a result of the agency's bad faith conduct, the appellant may submit to the agency an itemized list of those costs. The Commission ordered the agency to reimburse appellant for costs incurred as a result of the agency's bad faith conduct during discovery.

Agency's Failure to Justify Nonproduction of Evidentiary Documents Justifies Adverse Inference

King v. U.S. Postal Service, EEOC Request No. 05940441 (February 2, 1995).

The appellant filed a complaint in which he alleged that the agency retaliated against him for previous EEO activity by awarding him the lowest possible rating on his application for a 204B supervisory detail. He had filed a previous EEO complaint against his supervisor. At least one member of the rating panel was aware of his prior complaint. The matter was heard by an administrative judge who issued a recommended decision finding discrimination.

The Commission ultimately concluded that the appellant had been subjected to retaliation. It based its determination on several factors. First, the record revealed that a majority of 204B details did not require panel ratings at all. Second, the rating panel members also failed to articulate the reasons for their rating of the appellant's application with sufficient specificity to afford the appellant the opportunity to establish pretext at the hearing. The Commission stated that the agency's failure to show good cause for not producing documentation pertaining to the rating process when asked to do so provided adequate justification for the administrative judge to draw an adverse inference against

the agency. In particular, the Commission noted that the agency failed to adequately justify not producing the applications of the other candidates when asked to do so. The Commission ordered the agency to make the appellant whole by awarding him appropriate back pay and benefits for lost 204B assignments and to provide him with such assignments in the future.

Administrative Judge Adverse Inference Ruling Upheld by Commission

Stull v. Department of Justice, EEOC Appeal No. 01941582 (June 15, 1995).

The appellant alleged sex and age discrimination when he was not selected for a supervisory position. Following the agency's investigation, the appellant requested a hearing before an EEOC AJ. During the course of discovery, the AJ ordered the agency to produce five pieces of documentary evidence: (1) an internal memorandum drafted by the agency's legal counsel entitled "Career Board Matters, Minority/Female Promotions and Assignments -- Career Development Program"; (2) an internal memorandum from the agency's legal counsel entitled "The Propriety of Consideration of Age of Candidates in Promotion Decisions"; (3) a legal opinion prepared by an outside attorney for use by the agency's legal counsel; (4) a memorandum from the agency's legal counsel entitled "EEO Officer Attendance at Career Board Meetings"; and (5) a document drafted by the agency's legal counsel entitled "Career Development Program, Recommendations of the SAC for Promotional Decisions". The agency refused to produce the documents, claiming the attorney-client privilege. It argued that in five other EEO cases relating to the same selection action it had asserted the attorney-client privilege and did not produce the evidence at issue. The AJ drew an adverse inference from the agency's failure to produce the documents, but found that despite this inference the appellant failed to show that his nonselection was discriminatory.

The Commission found that the AJ had properly drawn an adverse inference from the agency's failure to produce the documents. When a party fails to produce relevant evidence within its control, the Commission stated, the failure to produce such evidence raises an inference that the evidence, if produced, would prove unfavorable to that party. The Commission noted that its regulations allow an AJ to draw an adverse inference if a party, without "good cause" shown, refuses or fails to respond to discovery requests for documents, records, comparative data, statistics, affidavits or the attendance of witnesses approved by the AJ. Observing that the agency had failed to produce the five requested documents, the Commission next addressed the agency's assertion that the attorney-client privilege was a showing of "good cause" for its failure to comply with the AJ's order for production. The Commission stated that the burden of establishing the existence of such a privilege is on the party asserting the privilege. The Commission observed that the agency's principal argument for applying the attorney-client privilege to these documents in this case was that the privilege had been applied to the same documents in other cases. The AJ had found that the agency failed to provide adequate information concerning the nature and content of each document to establish the existence of the privilege in this case. After reviewing the record, the Commission concluded that the AJ had properly exercised her discretion to draw an adverse inference from the agency's failure to produce the requested documents. It noted that one of the documents, the legal opinion prepared by outside counsel, did appear to fall within the protection of the attorney-client privilege. However, the

Commission added, given that the existence of the privilege was not readily apparent and was not proved by the agency as to the remaining four documents, the possible existence of the privilege with regard to the fifth document did not compel a different outcome in this regard. Despite the adverse inference drawn with regard to those documents, however, both the AJ and the Commission on appeal concluded that the appellant had failed to prove that his nonselection was due to unlawful discrimination.

Commission Applies Adverse Inference and Finds Discrimination

Wasser v. Dep't of Labor, EEOC Request No. 05940058 (Nov. 2, 1995).

The appellant alleged sex and age discrimination when she was not selected for a GS-12 Economist position for which she had applied. After an investigation and a hearing, the AJ issued a recommended decision finding discrimination, drawing an adverse inference against the agency for its failure to produce SF-171 forms for the appellant and the selectee. The agency rejected the recommended decision and issued a finding of no discrimination, stating that the selectee was better qualified for the job.

On appeal, the Commission observed that the appellant had established a prima facie case, in that she was 66 years of age and the selectee was a male under age 40. The Commission found in its examination of the evidence of record that the appellant was better qualified for the position than the selectee, based upon their respective educational backgrounds, work experience and performance appraisals. Its finding that the appellant was better qualified was also based in part on the adverse inference applied by the AJ. At the hearing, the AJ had noted that the SF-171's of the appellant and the selectee were incomplete, and ordered the agency to produce them in their entirety. When the agency failed to do so, the AJ drew an adverse inference against the agency, finding that had the requested SF-171's been provided by the agency, they would have reflected unfavorably on the agency's position that it chose the best qualified candidate. The Commission found that the AJ had properly applied an adverse inference in this case. It rejected the agency's argument that the missing information was due to an "administrative error," noting that the agency had failed to explain why such error was not corrected even in its submission of the record to the Commission on appeal.

The Commission determined that the appellant's qualifications were so plainly superior to those of the selectee that the reasons given by the agency for her nonselection must have been a pretext for intentional discrimination. Based upon this finding of pretext, together with the elements of the prima facie case and based upon the record as a whole, the Commission concluded that the appellant had proven sex and age discrimination. It ordered the agency to retroactively promote the appellant to the position of Economist, GS-12, and provide her back pay and other benefits which she would have received in the absence of discrimination.

Failure to Comply with Remand Order Results in Adverse Inference and Finding of Discrimination

Lebron v. U.S. Postal Service, EEOC Appeal No. 01943052 (Jan. 19, 1996).

The appellant, a tool and parts clerk for the agency, filed a complaint alleging national origin discrimination (Hispanic) when he was denied the opportunity to be utilized as an acting supervisor. After an investigation, the appellant requested a final decision without a hearing, and the agency issued a finding of no discrimination. Following an appeal and a subsequent request for reconsideration to the Commission, the Commission found that the record lacked sufficient information for a determination on the merits of the appellant's complaint, and ordered the agency to conduct a supplemental investigation and issue a new final decision on the merits of the appellant's complaint. The agency conducted the supplemental investigation and issued a new final decision finding no discrimination, which the appellant again appealed to the Commission.

On appeal, the Commission observed that the supplemental investigation file contained three affidavits and ten exhibits, but that the agency's supplemental investigation failed to fully comply with its remand order in its previous decision. Specifically, the Commission noted that it had ordered that the agency's supplemental investigation include affidavits from specific agency officials concerning acting supervisory assignments, and a listing of comparative employees who were allowed the opportunity to serve as acting supervisors in the facility, including their national origins. The Commission also ordered the agency to provide the report of supplemental investigation to the appellant and provide him a reasonable amount of time to respond in the form of an affidavit, to be included in the supplemental investigation file. The Commission found that the agency had failed to fully comply with its instructions in this regard. The Commission cited 29 C.F.R. § 1614.108(c)(3) for the proposition that it could draw an adverse inference where a party fails, without "good cause" shown, to provide fully and in a timely manner for requests for information. Observing that the agency had failed to provide any explanation as to why the information was not provided, the Commission drew an adverse inference against the agency in all matters where the requested evidence from the supplemental investigation was not provided by the agency. The Commission found that the agency had failed to provide any information as to why named comparative employees were provided supervisory assignments while the appellant was not. Inferring that the requested information and the testimony of the requested witnesses would have reflected unfavorably on the agency, the Commission concluded that the agency discriminated against the appellant on the basis of his national origin when it denied him supervisory assignments.

3. REHABILITATION ACT ISSUES

AGENCY FAILED TO CONDUCT DIRECT THREAT ANALYSIS

*****Trusty v. Department of Veterans Affairs, EEOC Appeal No. 01956653 (June 5, 1998)*****

Appellant was working as an Encephalograph (EEG) Technician at an agency medical center when he filed an EEO complaint alleging age and disability discrimination. His allegations included claims that the agency discriminatorily failed to return him to full duty and attempted to terminate him.

Following an incident at work in February 1993, appellant left work, and by letter informed the medical center director that he was very depressed. In early April 1993, appellant returned to work. His attending psychiatrist wrote the agency that appellant was not a threat to patients and that he could return to his EEG Technician position, but the agency did not return him to full duty. Instead, he was assigned to assist a secretary with clerical duties. The agency thereafter referred appellant to a psychologist for a fitness for duty exam, which resulted in an evaluation that appellant's memory ability was moderately impaired. An agency physician thereafter determined that appellant should not have contact with patients because of possible impaired judgment. In neither of the letters sent to the agency did appellant's psychiatrist mention memory impairment, brain dysfunction, or dementia. Appellant was not permitted to return to full duty as an EEG Technician until November 1994. The agency also denied his step increase in February 1994 based on its perception that appellant could not perform the duties of his position, and repeatedly asked appellant to consider early retirement for medical reasons.

The agency issued a final decision finding no discrimination which appellant appealed. The Commission found that the agency failed to show that appellant posed a significant risk of substantial harm to patients, a showing that is necessary before an individual can be excluded from an employment opportunity. The Commission reasoned that the agency's initial finding regarding the safety of patients was not explained in any detail, nor did the agency include an individual assessment of appellant's ability to perform his duties as required by 29 C.F.R. § 1630.2(r). Also, the Commission noted that the agency psychologist's report was unaccompanied by objective, factual evidence of the nature and effect of the suspected disability. This report was contrasted with the contradicting opinion of appellant's attending psychiatrist. The Commission reversed the agency's finding of no discrimination on the basis of disability. As stated above, appellant had been returned to full duty in November 1994, so the agency was not ordered to do as part of the ordered remedy. The Commission ordered the agency to grant appellant a retroactive step increase, to expunge specified information from appellant's personnel records, to award him back pay, and to conduct training for management staff at the facility where the discrimination took place. The agency was also ordered to determine appellant's entitlement to any compensatory damages.

EXCLUSION FROM INSURANCE COVERAGE IS AN IMPERMISSIBLE DISABILITY-BASED DISTINCTION

Polifko v. Office of Personnel Management (OPM), EEOC Appeal No. 01960976 (April 3, 1997), request for reconsideration denied, EEOC Request No. 05970769 (January 23, 1998).

The issues raised in this case were whether the appellant could bring a claim of disability discrimination based on his wife's disability, and whether the denial of insurance coverage involved a term, condition or privilege of employment. A federal employee's health insurance carrier denied coverage for the treatment HD/ABMT (high dose chemotherapy with autologous bone marrow transplant), which had been recommended by a physician treating the employee's wife for breast cancer. The employee filed an EEO complaint of disability discrimination. He named OPM, which administers the health insurance program for all agencies, as the agency which had discriminated

against him. (He was not an employee of OPM.) Initially, the agency dismissed the complaint for failure to state a claim, on the grounds that the employee's wife, not the employee, was the aggrieved party, and she was not a federal employee. The agency also stated that coverage was denied based upon the terms of the insurance policy, not the wife's disability. The terms of the policy specifically listed breast cancer as not being covered for the type of treatment sought by the appellant's wife.

When the employee appealed the agency's dismissal to the Commission, the Commission in an earlier decision ruled that the complaint did state a claim (EEOC Request No. 05940611; January 4, 1995). The Commission noted that it is a violation of the Rehabilitation Act to deny job benefits to a qualified individual because of the known disability of an individual with whom the individual is known to have a family, business, social or other relationship or association. Moreover, the Commission pointed to a provision in EEOC's "Interim Enforcement Guidance on the Application of the ADA of 1990 to Disability-Based Distinctions in Employer-Provided Health Insurance." The cited provision states that coverage of an employee's dependents under an employer-provided health insurance plan is a benefit available to the employee. The Commission found that the denial of insurance coverage involved a term, condition or privilege of employment, and concluded that the appellant had standing to bring a claim of disability discrimination. The Commission remanded appellant's complaint to the agency for investigation. The agency was directed to determine whether the exclusion of the treatment was a disability-based distinction, and whether the exclusion was justified under standards set out in the EEOC Interim Guidance. The resulting final agency decision asserted that the exclusion was not disability-based, but rather was based on the medical suitability of the procedure to treat the specific cancer.

On appeal, the Commission ruled that the exclusion was an impermissible disability-based distinction, as the distinction in the insurance policy applied to a specific disability, and affected only persons who have that disability. The Commission also decided that the agency failed to justify the exclusion. The Commission ordered the agency to remedy the discrimination, including payment of the past pecuniary losses, to be calculated in cooperation with appellant, that resulted from the denial of coverage. The agency filed a request to reconsider this decision; the request was denied.

IN DISABILITY CASE, PERSON WAS NOT QUALIFIED WHERE UNABLE TO WORK

Long v. Department of the Air Force, EEOC Petition No. 03970108 (October 6, 1997).

Appellant was off duty because of her severe depression and post traumatic-type symptoms from April 1992 until her removal in August 1995. The agency based its removal decision on petitioner's inability to perform her duties due to a medical condition. In a mixed case complaint, appellant alleged that her removal constituted a failure to accommodate her disability, and also was due to race and national origin discrimination and retaliation. The Merit Systems Protection Board (MSPB) decided that the removal was not discriminatory, in part based on a finding that due to her lengthy and ongoing inability to report for duty, petitioner was not a qualified individual with a disability. Petitioner thereafter asked the Commission to review the no-discrimination aspect of the Board's decision. The Commission decided that petitioner had a disability within the meaning of the Act, and

there was a causal connection between her disability and her removal. Because petitioner had been unable to work since April 1992, the Commission agreed with the MSPB's determination that she was not a qualified individual with a disability. The Commission concurred with the MSPB's findings of no discrimination.

Appellant Not "Qualified Disabled" Due to Aggressive and Threatening Behavior

Ferrell v. Department of the Army, EEOC Petition No. 03960032 (April 9, 1997).

Petitioner filed an appeal with the Merit Systems Protection Board (MSPB) alleging that he was discriminated against on the basis of mental disability when he was removed from employment for insubordination and creating a disturbance in the workplace, which included abusive and aggressive behavior toward supervisors and coworkers. An MSPB administrative judge found no discrimination and sustained the agency's action. Petitioner then filed a petition for review with the Commission.

The Commission first found that the medical evidence showed that the petitioner had physical and mental impairments. He suffered from seizures caused by brain damage as a result of an accident. A doctor testified that there was a structural lesion on the portion of his brain that was injured and that this part of the brain regulates emotional functioning. Noting that merely having a "quick temper" is not an impairment for the purposes of the Rehabilitation Act, the Commission distinguished the petitioner's condition, which it found had a neurophysiological origin. The Commission further found that the impairment substantially limited a major life activity, e.g., his ability to interact with others.

The Commission concluded, however, that the petitioner was not a "qualified individual with a disability." Although he could perform the functions of his job, he engaged in threatening behavior in the workplace. He was diagnosed by one doctor as having "intermittent explosive disorder." The doctor noted that the petitioner, agitated over an experience with his supervisor, mentioned that he could "cut his [supervisor's] throat" or "blow his brain." The record showed that the petitioner had engaged in threatening and aggressive outbursts at the workplace, and that he could not control his anger in discussions with supervisors. The Commission found that, because his actions posed a threat to the physical safety of his supervisors and coworkers, the petitioner was not a qualified individual with a disability. The Commission noted that the Rehabilitation Act did not preclude an employer from establishing and enforcing standards of employee conduct as long as such standards are job-related, consistent with business necessity, and enforced uniformly among all employees. It noted that its recently issued "Enforcement Guidance on the ADA and Psychiatric Disabilities" [reproduced in this issue of THE DIGEST OF EEO LAW in its entirety] provides that "an employer may discipline an employee with a disability for engaging in... misconduct if it would impose the same discipline on an employee without a disability." The Commission concluded that the agency removed the petitioner for violating an implicit standard of employee workplace conduct that bars threats of violence against others, a standard that is, by definition, job-related and consistent with business necessity. It further noted that there was no evidence that the agency treated the petitioner differently than other

employees who engaged in similar actions. The Commission concurred with the MSPB finding of no disability discrimination.

Medical Documentation Establishes Disability

Randel v. Department of the Navy, EEOC Petition No. 03960070 (August 8, 1996).

Petitioner was removed from employment for being absent without official leave. He appealed his removal to the Merit Systems Protection Board (MSPB), raising a defense of mental disability, and thereafter petitioned the Commission to review the MSPB's decision to sustain the removal. The Commission's decision focused on the agency's handling of the medical documentation submitted by petitioner. He had asked the agency for extended sick leave. In response, the agency required him to submit supporting medical documentation, and specified the subjects the documentation should cover. Petitioner submitted documentation from his psychiatrist four times. Included in his submissions was information regarding a diagnosis, prognoses, and the physical and psychological effects of petitioner's mental impairments. During this time frame, petitioner stopped reporting to work. He also requested a reassignment to another position. The agency denied petitioner's leave request on the grounds that the submitted documentation was inadequate, and removed him from employment. Although the agency considered reassignment before deciding on the removal, it did so only in the context of resolving a perceived personality conflict, not as an accommodation of petitioner's medical condition. The MSPB, accepting the agency's contention that petitioner's submitted medical documentation was inadequate, sustained the removal.

The Commission determined that petitioner's medical documentation was sufficient to put the agency on notice that petitioner had a mental disability. The Commission reasoned that the documentation was authentic, was submitted by a physician, and indicated a diagnosis of major depression for which petitioner was taking medication and receiving psychotherapy. Under those circumstances, the agency should not have rejected the diagnosis or substituted its own non-medical "diagnosis" of the reasons petitioner was absent from work. If the agency questioned the validity of the physician's diagnosis, the Commission stated, it had an affirmative obligation under the Rehabilitation Act to obtain additional information either from petitioner's physician or from a fitness-for-duty examination. The Commission also noted that the agency failed to consider reassignment as an accommodation to petitioner's disability. Because the agency failed to meet its obligations under the Rehabilitation Act, the Commission decided that the removal constituted disability discrimination, and differed with the MSPB. Where the Commission differs, the case is referred back to the MSPB. See 29 C.F.R. §1614.305(e). The Commission's decision was subsequently concurred in and adopted by the MSPB. 72 M.S.P.R. 288 (Nov. 12, 1996). The MSPB forwarded the matter to one of its field offices for adjudication of the petitioner's claim for compensatory damages.

Agency Failed to Act on Medical Information Submitted by Appellant

Meyer v. Department of the Army, EEOC Appeal No. 01944240 (August 9, 1996).

Appellant filed an EEO complaint alleging disability discrimination when the agency reassigned him and failed to accommodate his disability. Appellant had been reassigned to an Exhibits Maker position pursuant to a Reduction-In-Force action. He signed a statement accepting the position during an August 1992 meeting with a Personnel Staffing Specialist, although he revised the statement in some particulars. According to appellant, he informed the Specialist at the time that he was concerned about the position because of several physical conditions, whereupon the Specialist asked appellant to submit medical documentation regarding his conditions. His reassignment became effective October 1, 1992, and the medical documentation arrived at the agency on October 5. In the submitted documentation, appellant's physician stated that appellant should not work as an Exhibits Maker due to his diabetes, arthritis, and other conditions. The agency's Medical Officer concurred. The Personnel Specialist received the documentation from appellant, but did not disseminate it to appellant's supervisors, nor did the personnel office otherwise make the supervisors aware of the fact that appellant was medically unsuited to the Exhibits Maker position as it was constituted. Appellant remained in the Exhibits Maker position until March 1993, when he was placed on extended leave. Following a hearing, an EEOC Administrative Judge issued a recommended finding of disability discrimination. The respondent agency rejected the Administrative Judge's recommended decision, and issued a decision of no discrimination, which appellant appealed to the Commission.

It was undisputed that appellant was an individual with a disability, the Commission noted, and found further that he was a qualified disabled individual. The Commission enumerated plausible accommodations that could be made in the Exhibits Maker position. Because the evidence submitted to the agency showed that appellant could not perform the essential functions of the position without risk of substantial harm to himself, the agency should have attempted to restructure his position or reassign him. The Commission reiterated its position that the burden is on the agency to show that the harm could not be eliminated or reduced by reasonable accommodation. It found that the agency failed to satisfy its reasonable accommodation duty. The Commission agreed with the Administrative Judge, reversed the agency's decision, and ordered corrective action. The agency was ordered to provide back pay and to investigate the question of appellant's entitlement to compensatory damages.

Evidence of 20% Disability Rating by Veterans Administration Fails to Establish Disability Under Rehabilitation Act

Cook v. United States Postal Service, EEOC Appeal No. 01943346 (September 7, 1995), reconsideration denied, EEOC Request No. 05960015 (June 21, 1996).

Appellant was in an agency training program to become a Transitional Employee. He failed to complete the training in the time permitted, and asked for removal of the training time limit as an accommodation, stating that the medication he was taking for an arthritic knee condition interfered with his ability to complete the training. In support of his request he submitted evidence of a 20 percent disability rating from the VA, and a physician's diagnosis. The agency denied appellant's request and he filed a complaint on the matter. The Commission observed that appellant made no showing that he had, had a record of, or was regarded as having, any substantial limitation of major life activities. Rather, he asserted that his impairment was "not physically limiting," and his physician

wrote that appellant was medically restricted only from operating heavy machinery. The physician stated that any concern about other machinery or safety concerns about manual mail sorting were "without medical foundation." The Commission stated that an impairment affecting only a narrow range of jobs is not substantially limiting in the major life activity of working, and in addition pointed out that a VA disability rating does not necessarily indicate a disability under the Rehabilitation Act. Because the appellant failed to show that he was a person with a disability, the Commission affirmed the agency's decision finding no discrimination.

Determination of Whether Job Function is Essential Must Be Based on How Job is Actually Performed

Lyles v. Department of Justice, EEOC Petition No. 03950152 (February 23, 1996).

The agency employed petitioner as a Fabric-Worker Foreman (FWF) at a federal penitentiary. It terminated petitioner after determining that he was medically unable to perform the duties of his position. Petitioner appealed his removal to the Merit Systems Protection Board, which issued a final decision upholding the agency's decision.

Petitioner's FWF position required him to supervise prison inmates in the sorting of mail bags for repair. In November of 1987, he was taken hostage and held for eleven days by inmates during a prison riot. As a result of this experience, petitioner remained out of work for over three years and had to undergo psychological counseling. The agency allowed him to return to work at a compound outside the prison walls initially, but informed him that he eventually would have to return to work inside the main facility. From January 1991 through September 1994, he worked at the compound, and only ventured inside the prison occasionally for staff meetings.

In January of 1994, an agency official informed petitioner that he would have to take an assignment inside the prison, and that if he declined to do so, he would be placed in home confinement and ordered to undergo a fitness-for-duty examination. In response, petitioner stated that he was unable to work and function inside of the prison and asked that the agency continue to provide him with the accommodation of being allowed to work outside the prison. The agency then ordered petitioner to undergo the fitness exam.

The agency proposed petitioner's removal in July of 1994, ostensibly on the grounds that the fitness exam revealed that he would not be able to work inside the prison on a sustained basis. The agency determined that petitioner's anxiety about working inside the prison and his concern that he might be taken hostage again rendered him incapable of performing his job duties. Those responsibilities included supervising inmates, performing searches and seizures, and using force to maintain control. The agency determined that no other positions were available into which he might be reassigned, because every prison employee had to be able to respond to emergency situations immediately. The agency found that petitioner's medical condition rendered him incapable of exercising the critical judgment necessary for dealing with emergencies without presenting a danger to himself or others. Petitioner's termination went into effect on September 1, 1994.

The Commission initially found that petitioner had demonstrated that he had a disability within the meaning of the Rehabilitation Act (depression and Post Traumatic Stress Disorder), and that a causal connection existed between his disability and the agency's reasons for his discharge. The Commission noted that petitioner must show that he was a "qualified" individual with a disability, meaning a disabled person who, with or without reasonable accommodation, can perform the essential functions of the position in question. The Commission stated that what constitutes the essential functions of a particular position is highly fact-specific, and that such a determination must be based on a job analysis of the actual functions of the position at the facility in question. It also indicated that such an analysis may require consideration not only of the employer's judgment about what functions are essential, but also the amount of time spent on those functions, the consequences of not performing those functions, and the experience of other holders of the position.

The Commission found that, based upon the record evidence and testimony in the case, neither petitioner nor other FWF foremen had been required to work inside the prison on other than an irregular or occasional basis. This, in the Commission's view, indicated that the requirement to work inside the facility on a sustained basis was not an essential function of the position at the time of petitioner's removal. The Commission also disagreed with the agency's assessment that petitioner was psychologically incapable of reacting to prison emergencies. It found that the testimony of two psychologists who actually examined petitioner supported his contention that he could respond to emergencies in an appropriate fashion. The Commission concluded that the agency discriminated against petitioner on the basis of disability in ordering his removal, and referred the matter back to the MSPB for further consideration.

Complainant Given Opportunity to Establish Nexus Between Absences and Disability

McCullough v. United States Postal Service, EEOC Request No. 05950539 (April 25, 1996).

Appellant filed a complaint in which she alleged that the agency discriminated against her on the basis of disability by issuing her a seven-day suspension for failure to meet the attendance requirements of her position. Appellant was absent for 72 hours between December 1992 and April 1993. She stated that she should not have been disciplined because her supervisor knew that she had asthma. She also stated that she had always provided documentation for her absences. Appellant's supervisor stated that the decision to discipline her was based strictly on her attendance record.

The Commission stated that in cases involving excessive absences from work, a complainant may prove that she is a qualified individual with a disability despite such absences by establishing a nexus between her absences and her purported disability. It also stated that, once the complainant makes the required showing of nexus, the agency has the burden to demonstrate that accommodating appellant's absences would impose an undue hardship upon its operations. It found the record insufficiently developed on the issue of disability discrimination and ordered the agency to conduct a supplemental investigation on whether appellant's absences were, in fact, related to the medical condition that she listed as her disability. The Commission also directed the agency to investigate

whether tolerating or excusing appellant's absences would have posed an undue hardship.

Association with Person with a Disability

Gholston v. Dep't of the Army, EEOC Appeal No. 01941795 (7/5/94).

Appellant alleged discrimination on bases of race and association with a persons with a disability (his spouse) when he was not selected for promotion. Agency dismissed second basis, stating that association with person with disability was not covered under the Rehabilitation Act. Commission noted that the Rehabilitation Act was amended to include the standards of Title I of the Americans With Disabilities Act used to determine whether non-affirmative action discrimination has occurred. Commission concluded that under these standards, discrimination the basis of a relationship or association with an individual with a disability is prohibited under the Rehabilitation Act. See 29 C.F.R. § 1630.8.

Individual Who Cannot Perform One Particular Job is Not Substantially Limited in Ability to Work

Groshans v. Department of the Navy, EEOC Petition No. 03950109 (February 1, 1996).

The agency employed petitioner as a contract specialist. While working in her cubicle, petitioner experienced a strong allergic reaction to chemical fumes in the building. On two occasions, she had to be administered oxygen and transported to a hospital. After the second episode, petitioner indicated that she did not want to work in the building. She was given temporary work space in an adjacent building. Three months later, the General Services Administration conducted an environmental survey of the building and concluded that any contaminant levels were within acceptable limits. Petitioner had experienced six other attacks, but her allergist opined that there were not tests for chemical sensitivities.

Petitioner's second-line supervisor asked her to return to the building because she was only able to do a small portion of her job while stationed in the adjacent building. Petitioner asked that she be allowed to work at home, or alternatively, that the agency install high efficiency filters in the building to remove the fumes. Petitioner's allergist indicated that the second option was not viable and recommended that petitioner be allowed to work at home or remain in the adjacent building. The supervisor looked into the possibility of installing air filters and found the costs prohibitive. The supervisor also rejected the other options, maintaining that petitioner would be unable to perform the essential functions of her job if she did not return to the building. Petitioner's supervisor also attempted to find a contract specialist position in another command, to which she could be reassigned, but was unsuccessful in this regard. Several months later, the supervisor issued a notice of removal on the grounds that petitioner was physically unable to perform the duties of her position.

Petitioner appealed her removal to the Merit Systems Protection Board. The Board found that petitioner was not an individual with a disability because her condition did not affect her ability to

work as a contract specialist anywhere except in that particular building. The Commission agreed with the Board's finding that petitioner was not a person with a disability. It stated that, although petitioner could experience a severe allergic reaction if she came into contact with certain chemical substances, she failed to show that she is substantially limited in the major life activity of breathing. It noted that the attacks petitioner experienced occurred only in that one particular building, and that there was no showing that she was limited in her everyday activities such as driving and shopping. The Commission also found that since petitioner could perform the job of contract specialist anywhere but in the building in which she had her reactions, she had not shown that she was substantially limited in her ability to work. It therefore concurred with the Board's findings and conclusions.

Employee With Disability Who Failed to Regularly Take Prescribed Medication deemed Unable to Perform the Essential Functions of His Position

O'Riordan v. Department of the Treasury, EEOC Request No. 05920815 (August 19, 1993).

The appellant, a criminal investigator with the United States Customs Service, filed a complaint in which he alleged that the agency discriminated against him on the basis of disability by reassigning him from the position of criminal investigator to work as an intelligence research specialist. The investigator position required irregular shifts and extensive work in potentially dangerous environments. The investigator would frequently be exposed to life-threatening situations involving the use of firearms.

The appellant had been hospitalized twice before being hired and had been given medication to control his condition. He was found to be medically qualified for the investigator position as long as he took his medication. Nevertheless, on the basis of a fitness-for-duty examination and an ongoing background investigation that included interviews with several doctors who treated the appellant, the regional commissioner decided to reassign the appellant to an intelligence research position. One agency-appointed doctor noted that appellant's performance under stress could not be predicted if he were to lose his medication or otherwise stop taking it. The record indicated that appellant did not always take his medication on a consistent basis.

The Commission found that the appellant had a disability in that he suffered from an impairment that substantially limited his ability to work in front-line law enforcement positions. However, the Commission concluded that the appellant was unable to perform the essential functions of the criminal investigator position without endangering his own safety or that of others. Although the appellant's disability posed no risk of harm as long as he took his medication, there was a reasonable probability that he would fail to consistently take his prescribed medication. As far back as 1987, the appellant had to be admonished by his doctor about his poor medication compliance, as well as his failure to regularly undergo periodic monitoring. Given the potential dangers inherent in the criminal investigator position as well as the unpredictable nature of the consequences of the appellant's failure to regularly take his prescribed medication, the Commission determined that the appellant was not a qualified individual with a disability.

SOCIAL DRUG USER NOT PROTECTED BY REHABILITATION ACT

Roman v. Department of Justice, EEOC Appeal No. 01942954 (May 9, 1997).

The appellant applied for a position with the agency's Federal Bureau of Prisons. When he was not selected, he filed a complaint of disability discrimination (past drug use). In response to interview questions, he had revealed that he had used drugs in the past. He stated that he had smoked marijuana during work hours at a previous job, he had used LSD and cocaine, he had been arrested for possession of marijuana, and had been arrested for driving under the influence. The agency stated that he was not selected because of his admitted drug use during work hours, and also because he did not possess the necessary skills or abilities to perform the refrigeration foreman position for which he had applied.

On appeal, the Commission noted that, in order for the appellant to establish a prima facie case under the Rehabilitation Act, he must first establish that he is a person with a disability within the meaning of that Act. The Commission found that he had not shown that he was a person with a disability. It noted that the Rehabilitation Act had been amended in 1990 to exclude persons currently engaged in the illegal use of drugs from protection under the Act. The appellant had argued on appeal that he was covered by an exception to that provision, which states that former users of illegal drugs who are no longer engaged in such use, or are erroneously regarded as engaging in such use, and who have completed a supervised rehabilitation program or have otherwise been rehabilitated successfully, are not excluded from the definition of an individual with a disability. Although the record showed that the appellant had not used drugs for several years, the Commission found that he did not fall within the exception in the statute excluding drug users from the Act's protection. Specifically, the Commission noted that "if an employer did not regard the individual as an addict, but simply as a social user of illegal drugs, the individual would not be 'regarded as' an individual with a disability and would not be protected by [the Act]." The Commission affirmed the agency's finding of no discrimination.

Rehabilitated Individual With Record of Drug Addiction Who No Longer Engages in the Illegal Use of Drugs is Protected by the Rehabilitation Act

Carr v. USPS, EEOC Appeal No. 01923559 (June 4, 1993).

As a result of taking too many unscheduled absences, the appellant was issued a notice of removal for failure to meet the attendance requirements of her position. She applied for reinstatement one year later, but her application was rejected. The appellant filed a complaint alleging that the agency refused to reinstate her because of her physical disability (drug addiction). On appeal, the Commission noted that although drug addiction had been recognized as a disability under the Rehabilitation Act, the Americans with Disabilities Act (ADA) amended the Rehabilitation Act to exclude persons who currently engage in the illegal use of drugs from the definition of an individual with a disability. The amendment states, in pertinent part: "(C)(i) For purposes of Title V, the term

'individual with handicaps' does not include an individual who is currently engaging in the illegal use of drugs when a covered entity acts on the basis of such use. (ii) Nothing in clause (i) shall be construed to exclude as an individual with handicaps an individual who- (I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use."

The record established that the appellant had been diagnosed as a recovering substance abuser with a history of chemical dependency, that she had successfully completed an agency EAP program, and that she was recommended for reinstatement. Based on this information, the Commission found that the appellant fell within exception (C)(ii)(I) outlined in Section 512. It also found that the appellant was an individual with a disability by virtue of her record of drug addiction and therefore was entitled to the protection of the Rehabilitation Act. The Commission went on to find that the appellant was a qualified individual with a disability and that she had presented a prima facie case of discrimination. However, the Commission ultimately concluded that the appellant was unable to show that the agency's articulated legitimate nondiscriminatory reason for its denial of her reinstatement request was pretextual. In particular, the Commission found that the record supported the agency's assertion that there were no vacancies at the time the appellant requested reinstatement. Accordingly, the Commission affirmed the agency's final decision finding no discrimination.

Employee Removed for Illegal Drug Use Cannot Claim "After-the Fact" Rehabilitation as a Defense

Wartley v. Department of Justice, EEOC Petition No. 03940136 (December 9, 1994).

The petitioner filed an appeal with the Merit Systems Protection Board, alleging that the agency discriminated against him on the basis of disability by removing him on the grounds that he used illegal drugs. The record showed that the petitioner had been arrested for possession of illegal drugs, that he had tested positive for the use of illegal drugs, and that the agency had initiated his removal pursuant to these findings by the local authorities. After his arrest on drug possession charges the appellant entered a rehabilitation program.

The Board sustained the charge of illegal drug use and upheld the removal. The petitioner argued, in a petition to the Commission to review the Board's decision, that he was discriminated on the basis of his disability of drug addiction when he was removed. The Commission stated that those who currently use illegal drugs are not considered individuals with disabilities under the Rehabilitation Act. It acknowledged that those who no longer use illegal drugs and have completed a rehabilitation program, or are currently participating in such a program, are not excluded from the protection of the Act. However, the Commission found that the petitioner did not qualify for protection under the Act based upon his "after-the-fact" rehabilitation.

The record established that the petitioner had engaged in the use of illegal drugs for several years prior to his arrest. The Commission noted that although the petitioner sought rehabilitation after the agency learned of his then-current drug use, that this did not operate to remove him from the

statutory category of current illegal drug user. The Commission emphasized that persons who are disciplined for current drug use should not be permitted to invoke the Rehabilitation Act's protection merely by showing "after-the-fact" rehabilitation. It concurred with the Board's finding upholding the petitioner's removal.

4. REHABILITATION ACT - REASONABLE ACCOMMODATION

EXTENDING EMPLOYEE'S LEAVE INDEFINITELY WAS NOT A REASONABLE ACCOMMODATION

Minehan v. Department of the Army, EEOC Petition No. 03970092 (November 12, 1997).

Petitioner occupied a management analyst position at the agency until her removal in September 1996. At the time of her removal, petitioner had been absent from duty since February 1994. Her physician had diagnosed her as having major depression. During the next two and one-half years, petitioner's physician twice sent letters informing the agency that petitioner could return to work if she were temporarily given a part time position in a different office. He also gave the opinion that petitioner would "likely" be able to return to work full-time in her previous position after the temporary assignment. The agency acknowledged both requests for accommodation. In response to the first letter, the agency in December 1994 asked petitioner for current medical documentation of her limitations, and asked her if she was willing and able to accept a position in another facility in the commuting area that was similar to her permanent position. The physician informed the agency that petitioner continued to be depressed and was unable to return to work at that time.

In response to the second letter from the physician, the agency stated that no position for which petitioner was qualified was available in the office petitioner desired. At the same time, the agency issued petitioner a notice of removal. This notice was rescinded because the Office of Workers' Compensation had accepted petitioner's claim for a work-related condition. More than a year later, in May 1996, the agency asked petitioner whether she intended to return to work. She responded that she intended to return as soon as possible. In July 1996, the agency issued another notice of proposed removal. Petitioner asked the agency to rescind it because she intended to return to her position whenever she recovered.

Petitioner appealed her removal to the Merit Systems Protection Board (MSPB), asserting that the agency failed to provide her with reasonable accommodation. When the Commission reviewed the discrimination aspects of her claim, it agreed, although for different reasons, with the MSPB's finding of no discrimination. The Commission decided that petitioner was an individual with a disability, but went on to decide that she was not a "qualified person with a disability." Given the fact that petitioner had been absent from work for more than two and one-half years, the Commission decided that asking the agency to extend her leave indefinitely was not a reasonable accommodation as it would unduly burden the agency's operation.

Interpreter Services Ordered as Reasonable Accommodation

Feris v. Environmental Protection Agency, EEOC Appeal No. 01934828 (August 10, 1995), reconsideration denied, EEOC Request No. 05950936 (July 19, 1996).

A deaf employee at the agency's headquarters filed a complaint alleging that for at least two years the agency failed to reasonably accommodate his need for a sign language interpreter. His duties included coordinating reviews of pesticide data, for which he had to conduct meetings and maintain contacts with scientists, lawyers, and managers. He also asserted that he required interpretive services at staff meetings, training sessions, seminars, policy briefings, and the like. The agency contracted for sign language interpretive services on an hourly basis, and maintained that this met its obligation to accommodate appellant. Appellant, however, claimed that reasonable accommodation mandated that the agency hire a staff interpreter. He alleged that the contracting effort was deficient; interpreters were frequently unavailable or unable to interpret the work and jargon of the agency. He noted that the contracting agencies required two weeks' notice, while meetings were sometimes held in shorter time frames. Appellant documented his two years of efforts to have the agency hire a staff interpreter. The record showed that agency officials engaged in discussions and proposals regarding hiring a staff interpreter, but made no decision to hire such until April 1993, after appellant filed his complaint.

The agency's position was that to provide accommodation beyond the contracted services was not necessary, pointing to the fact that appellant had always been promoted timely and had received satisfactory evaluations. In addition, the contracted services were justified on the grounds that appellant's coworkers in good faith repeatedly attempted to secure interpretive services on appellant's behalf. The agency also argued undue hardship on budgetary and funding grounds.

The Commission observed that appellant's attendance and participation at meetings was crucial to his employment, and that he was harmed whenever he was unable to attend a meeting at which he could have affected the outcome. The Commission found that appellant was deprived of interpretive services on numerous occasions, and that the agency was clearly and repeatedly advised of the deficiencies in the level of accommodation. With respect to the agency's argument regarding appellant's ability to perform his essential functions, the Commission concluded that reasonable accommodation is not limited to whatever permits performance of the essential functions of appellant's position, but rather should provide individuals with the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability.

The agency also argued that it had made a "good faith" effort to accommodate appellant's disability. In that regard, the Commission determined that the agency's assertion of good faith was not supported by the record and that, in any case, good faith attempts falling short of accommodation do not satisfy the agency's obligations. In addition, the Commission found that the agency failed to prove that hiring an interpreter would pose an undue hardship, observing that it was not cost, but rather the agency's failure to assign a high priority to the hiring matter, that was the true issue.

The Commission concluded that the agency discriminated against appellant when it failed to provide an interpreter at important staff meetings, workshops, and seminars. The agency was directed to consider appellant's claim for compensatory damages, with the Commission deciding that the good faith exemption to a compensatory damages award did not apply in this case. The agency was directed to provide an interpreter whenever needed for an employee to understand what is occurring at each and every crucial time in his or her career, and to retain the services of staff interpreters as needed in order to meet this reasonable accommodation obligation. In addition, the agency was directed to provide training to the managers and supervisors mentioned in the decision.

Under 1992 Amendments to the Rehabilitation Act, Agencies are No Longer Required to Offer Firm Choice as a Reasonable Accommodation for Alcoholism

Johnson v. Department of the Interior, EEOC Petition No. 03940100 (March 28, 1996).

Petitioner filed an appeal with the Merit Systems Protection Board, in which he alleged that the agency discriminated against him on the basis of disability (alcoholism) in June of 1993 by terminating him. The agency had previously initiated removal proceedings against petitioner in December of 1991 for misconduct and tardiness, but the removal was reduced to a forty-five day suspension. Pursuant to that disciplinary action, the agency warned petitioner that any future misconduct would result in his removal, and that if he had a substance abuse problem, to become rehabilitated. Thereafter, petitioner entered an inpatient alcohol treatment program in February of 1993.

Petitioner submitted documentation that he remained in the program from February 4-13, 1993. He did not return to work, however, until March 5, 1993. In April 1993, the agency proposed to remove petitioner for absence without leave between February 14 through March 3, 1993, and providing false information to a management official concerning his whereabouts. The parties stipulated that petitioner was a disabled employee suffering from substance abuse, that the agency knew this, that the misconduct which gave rise to the removal action was caused by the disability, and that the sole issue to be determined was whether the agency fulfilled its legal obligation to provide petitioner a firm choice between discipline and treatment. Petitioner did not dispute the merits of the charges against him. The Board upheld the removal and petitioner sought review with the Commission of the Board's findings and conclusions.

The Commission stated that federal employers are no longer required to provide the reasonable accommodation of firm choice under section 501 of the Rehabilitation Act, because the Rehabilitation Act Amendments of October 29, 1992 changed the applicable standard. Specifically, it found that under section 104(c) of the ADA, 42 U.S.C. § 12114(c)(4), employers may hold an alcoholic employee to the same qualification standards for job performance as other employees, and do not have to excuse violations of uniformly-applied conduct or performance standards as a form of reasonable accommodation. It concluded that the agency was not required to provide petitioner with a firm choice, and that the agency's removal of petitioner was proper.

Reassignment as a Reasonable Accommodation Limited to Jobs Within Same Commuting

Area and Subject to Same Appointing Authority

Santos v. U.S. Postal Service, EEOC Request No. 05940573 (January 23, 1995).

The appellant filed a complaint in which she alleged that the agency failed to provide her with a reasonable accommodation for her mental disability. The agency adopted an administrative judge's finding of disability discrimination and reprisal, but as relief for the discrimination the agency offered her a position in the same facility in which prior incidents of harassment had taken place. The appellant challenged this remedy in an appeal to the Commission. In support of her appeal, the appellant offered statements by two physicians who treated her. These physicians recommended that she not be returned to the facility at which she had worked previously, in order that she have no further contact with the individuals involved in the incidents of harassment. The appellant contended that, as part of its obligation to provide her with a reasonable accommodation, the agency was required to consider inter-agency transfers as well as transfers nation-wide, or otherwise outside the commuting area.

The Commission stated that although an agency is required to consider reassigning employees to other positions as a means of providing reasonable accommodation, this requirement does not include consideration of every possible reassignment. The Commission emphasized that the agency's duty does not extend to finding the employee an ideal job or initiating an ongoing search beyond a specific facility or installation.

The Commission stated that an inter-agency transfer is beyond the scope of its regulations regarding reassignment and reasonable accommodation. The Commission found that, as a factual matter, the agency would be unable to impose an accommodation arrangement on a different agency, nor would it be able to influence that agency's personnel operations or mission goals. It also stated that the agency's obligation to consider reassignment extends only to those facilities within the same commuting area and subject to the same appointing authority as the facility from which reassignment is sought. It noted that the commuting area would be determined on a case-by-case basis. The Commission ultimately concluded that the appellant had not met her burden of proof regarding the agency's failure to accommodate her.

5. TIMELINESS ISSUES

EEO COUNSELOR MUST INQUIRE INTO REASONS FOR COMPLAINANT'S UNTIMELY CONTACT

******McDonald v. Department of Transportation, EEOC Request No. 05960642 (August 11, 1998)*******

Appellant alleged that he had been repeatedly passed over for a promotion between January 1990 and

September 1, 1994 because of his race, sex and age. He first contacted an EEO counselor on February 7, 1995. He subsequently filed a complaint of discrimination, which the agency dismissed for failure to contact an EEO counselor within 45 days of the alleged discriminatory act. On appeal, the Commission stated that it is incumbent on the EEO Counselor to inquire into the reasons for the delay when a complainant initiates counseling beyond the 45-day limit for doing so. The Commission saw no indication that the EEO Counselor conducted such an inquiry. To explain why he did not contact a counselor until February 1995, appellant asserted that he did not become aware of the discrimination until mid-January. On the ground that his assertion was un rebutted, the Commission found appellant's contact timely and remanded the complaint for processing. The agency requested consideration.

The Commission cited to precedent holding that an EEO counselor must inquire into the reasons for a complainant's delay in making counselor contact. In this case, the Commission noted, the counselor made no effort to inquire into the reasons appellant did not contact an EEO Counselor. Indeed stated the Commission, the counselor did not take any steps at all to gather information to resolve the issue.

The Commission modified the remand order of the previous decision, remanding the complaint to the counseling stage for a determination as to when appellant reasonably suspected discrimination. The agency was further advised to amend its counseling report form to include information pertaining to the timeliness of a complainant's initial contact with an EEO counselor

REFUSING TO IMPUTE CONSTRUCTIVE NOTICE TO AN APPELLANT

Belton v. Department of Veterans Affairs, EEOC Request No. 05950835 (December 5, 1997).

In 1994, the agency dismissed a number of appellant's complaint allegations for untimely contact with an EEO Counselor. Appellant on appeal asserted that he was unaware of the time limitation, and in the absence of agency evidence showing that time limitations were posted, the appellate decision reversed the agency's dismissal of the allegations. The agency filed a request to reconsider (RTR), submitting additional information regarding the location and content of its posted EEO notices. The agency also contended that its additional submission should be permitted at the RTR stage, even though under Commission RTR standards a party cannot submit new material unless it was previously unavailable. Additional material was warranted, contended the agency, because the Commission's standards for imputing constructive notice of time limits to a complainant had become stricter. The Commission's standards for imputing constructive notice were set out in Pride v. United States Postal Service, EEOC Request No. 05930134 (August 19, 1993). The Commission rejected the contention, noting that Pride was issued well before the agency issued its final decision in this case.

Complainant May Satisfy Counselor Contact Requirement with Any Official Logically Connected to EEO Process

Hanson v. Department of the Army, EEOC Request No. 05960084 (June 27, 1996).

Appellant contacted the agency's Adjutant General's Office by letter dated June 28, 1994, regarding his unsuccessful application for employment in two wage-grade positions. Appellant specified in the letter that it should be directed to the attention of an EEO counselor. The Equal Employment Manager responded that appellant's correspondence was received on July 5, 1994, and that appellant could file an EEO complaint if he believed that employment discrimination was involved in the selection process. The Equal Employment Manager instructed appellant to contact the selecting officials and the personnel office for pertinent information. On August 18, 1994, the Personnel Officer advised appellant to contact the Equal Employment Manager if he wished to pursue a discrimination claim.

On August 23, 1994, appellant submitted a letter to the Manager requesting to file a discrimination complaint on the bases of age and disability in connection with his nonselection for the two positions in question. The Manager referred the matter to an EEO counselor on August 25th. He filed his formal complaint on October 4, 1994. The agency dismissed appellant's complaint on the grounds that he failed to timely contact an EEO counselor. The agency asserted that appellant did not contact an EEO counselor until August 25, 1994.

The Commission stated that a complainant may satisfy the counselor contact requirement by initiating contact with any agency official logically connected with the EEO process, even if that individual is not a counselor, as long as the contact is made within 45 days of the date of the alleged discriminatory event or action. It found that the Equal Employment Manager was such an official, and that appellant first contacted the Manager on July 5, 1994, well within the 45-day time period for doing so. The fact that appellant was seeking information on what options were available to him regarding appeal of the hiring decisions was enough, in the Commission's view, to put the agency on notice that appellant was attempting to raise allegations of discrimination in his letter of June 1994. The Commission reversed the dismissal of the complaint and ordered the agency to process the remanded allegation.

CONTACT WITH OFFICE OF SPECIAL COUNSEL DOES NOT SATISFY EEO CONTACT REQUIREMENT

Steinert v. Department of Veterans Affairs, EEOC Request No. 05960535 (October 9, 1997).

Appellant's complaint of religious discrimination was dismissed by the agency because of untimely contact with an EEO Counselor. He appealed and argued that, because he had raised his complaint with the Office of Special Counsel (OSC) before he began the EEO process, his time for contacting an EEO Counselor should be tolled. His argument was rejected in the appellate decision, and the agency's dismissal was affirmed. The Commission denied appellant's request to reconsider, stating that it found no basis for disturbing the appellate decision. The Commission cited to precedent which refused to toll the EEO time limit because of contact with the OSC.

Attorney's Receipt Triggers Beginning of Filing Period

Porter v. United States Postal Service, EEOC Request No. 05960398 (November 13, 1996).

Appellant sought EEO counseling regarding a scheduled fitness-for-duty examination and a letter of warning. During counseling, appellant designated an attorney as his representative, and when counseling was completed, the agency mailed a Notice of Final Interview to appellant in care of the attorney. The Notice informed appellant that he had a right to file an EEO complaint within 15 days of his receipt of the Notice. The Notice also stated that a Notice of Right to File and a complaint form were enclosed. The certified mail return receipt indicated that the attorney received the mailing on November 14, 1994. No complaint was filed within the 15 day filing period. Appellant stated that he did not receive a copy of the mailing and the attorney did not tell him about receiving it. Appellant so informed the agency and a second mailing was sent to appellant directly. He received the second mailing on January 20, 1995 and filed his complaint four days later. When the agency dismissed the complaint as untimely filed, appellant appealed to the EEOC.

The Commission's initial decision on the appeal stated that the original mailing was not proper service on the attorney, because the mailing was to appellant in care of the attorney. Appellant's complaint was remanded to the agency for processing. The agency requested the Commission to reconsider its decision. The Commission granted the agency's request, deciding that the mailing of the original package to appellant's attorney was proper service. It reasoned that nothing in its regulations indicates that mailing documents to a complainant in care of an attorney constitutes improper service. The Commission reversed its initial decision, and affirmed the agency's decision to dismiss the complaint as untimely.

Receipt of Notice By Non-Attorney Representative Insufficient to Commence Running of Time Limit in Which to Request Hearing

Erdman v. Department of the Army, EEOC Request No. 05950215 (May 23, 1996).

Appellant filed a formal complaint in which she alleged that the agency discriminated against her on the basis of sex by not selecting her for a senior program analyst position. The agency investigated the complaint and issued a proposed disposition in June of 1991, which included a statement that appellant could request a hearing before an administrative judge. However, the proposed disposition was never delivered to appellant. The envelope containing the proposed disposition indicated that the Postal Service attempted to deliver the document three times, and that it was returned to the agency unclaimed in July of 1991. Appellant eventually received the proposed disposition on December 12, 1991, after the agency reissued it. She requested a hearing on December 24th. The agency rejected appellant's hearing request as untimely and issued a final decision of no discrimination, from which appellant appealed.

The Commission stated that actual receipt of the proposed disposition was necessary to start the running of the time limit in which to request a hearing. It found that the agency failed to show that

appellant actually received the proposed disposition before December 12, 1991. The agency argued that it had sent a copy of the proposed disposition to appellant's representative, who was not an attorney. The Commission rejected this argument. It reiterated that receipt of a document by a non-attorney representative is insufficient to establish constructive notice on the complainant's part. It therefore ordered the agency to forward the matter to an administrative judge for a hearing.

Constructive Receipt Doctrine

Fontanella v. General Services Administration, EEOC Request No. 05940131 (April 10, 1995).

The appellant filed several complaints concerning various adverse actions, all of which were dismissed by the respondent agency as untimely. The agency's final decision indicated that the appellant had received the EEO counselor's Notice of Final Interview on May 24, 1993, and that he had not filed a complaint until June 17, 1993, beyond the 15-day limitations period. On appeal to the Commission, the appellant argued that he had not personally received the Notice of Final Interview on the date cited by the agency, because he was out of town at the time. The notice was received and signed for by an individual at the appellant's home while he was out of town. The appellant stated that he did not actually see the notice until June 7, 1993, and that his complaints therefore should be considered timely.

The Commission stated that receipt of a document at a complainant's correct address by a member of the complainant's family or household of suitable age and discretion constitutes constructive receipt by the complainant. It added that when a certified U.S. Postal Service return receipt has been signed by an unidentified individual at the complainant's address on a date certain to indicate delivery of an important document, it has effectively relied upon the certified receipt to establish a presumption of constructive receipt of the document by the complainant on that date. However, the Commission continued, this presumption is rebuttable by presenting evidence on appeal demonstrating that the individual who signed the return receipt was not a family or household member of suitable age or discretion. For equitable reasons, the Commission stated, complainants must be given notice that this presumption of constructive receipt is being relied upon in order to dismiss a complaint as untimely, so that the complainant has an opportunity to provide evidence on appeal rebutting the presumption. The Commission stated that when an agency elects to dismiss a complaint on timeliness grounds and is relying upon a return receipt signed by someone other than the complainant, it must advise the complainant in its final decision of the substance of the constructive receipt doctrine, and that it is relying on that doctrine to dismiss the complaint. The Commission remanded the complaint in order to provide the appellant the opportunity to demonstrate that the individual who signed for the notice was not a household or family member of suitable age and discretion.

Receipt of Document by Non-Attorney Representative Insufficient to Establish Constructive Receipt by Complainant

Carrigan v. United States Postal Service, EEOC Request No. 05950264 (August 31, 1995).

The agency dismissed appellant's EEO complaint on the grounds that she failed to timely file a formal written complaint after her designated representative received the Notice of Final Interview. The record established that the representative was not an attorney.

The Commission stated that under its regulations, when a complainant's representative is not an attorney, receipt of a document by such non-attorney representative is insufficient to establish constructive notice to the complainant. It further stated that under such circumstances, receipt of the document by the complainant herself determines when the limitations period begins to run. Because the record contained no information as to when appellant received the notice of final interview, the Commission remanded the matter for processing.

Receipt by Member of Appellant's Family At Correct Address Constitutes Constructive Receipt

Hill v. Department of Transportation, EEOC Request No. 05950050 (November 22, 1995).

Appellant filed an appeal from the agency's final decision of no discrimination. The Commission found that appellant received the agency's decision on October 29, 1993, but did not file his appeal until November 30, 1993, beyond the 30-day period for filing an appeal under 29 C.F.R. § 1614.402(a). Appellant claimed that he did not receive the agency's decision until November 2, 1993, as his wife signed for its receipt.

The Commission stated that receipt of a document at a complainant's correct address by a member of the complainant's family of suitable age and discretion constitutes constructive receipt by the complainant. The Commission found that, even though appellant did not see the final decision until November 2, 1993, the fact that his wife signed for it on October 29, 1993, established that appellant had constructively received it on that earlier date. The Commission therefore dismissed appellant's appeal as untimely.

Constructive Notice Doctrine - Polsby v. Shalala

Suttles v. U.S. Postal Service, EEOC Request No. 05930811 (March 31, 1994).

The appellant contacted an EEO counselor ten months after she was terminated. She stated that she had only become aware of her EEO rights thirteen days prior to counselor contact. The counselor's report noted the presence of EEO posters on the door to the station manager's office.

The appellant filed a formal complaint, which the agency rejected for failure to timely contact a counselor. The agency maintained that the necessary information had been posted, and that the appellant therefore had constructive notice of her EEO rights. The Commission, however, concluded that the information in the counselor's report regarding posting was inadequate to support a finding that the appellant had constructive notice of her obligation to timely contact an EEO counselor. Citing *Polsby v. Shalala*, 113 S. Ct. 1940 (1993), the Commission stated that it was unclear from the

record whether the agency's posting specifically included a statement of the time limit for contacting an EEO counselor. The Commission emphasized that to sustain a claim of constructive notice, the agency would have to provide specific evidence that the poster contained notice of the time limit at issue. Accordingly, the Commission remanded the matter for further processing.

6. EQUITABLE TOLLING OF LIMITATIONS PERIODS

ILLNESS NOT SHOWN TO BE INCAPACITATING IS INSUFFICIENT TO TOLL PERIOD TO FILE COMPLAINT

*****Davis v. United States Postal Service, EEOC request No. 05980475 (August 6, 1998)*****

Appellant received her notice of right to file a formal complaint of discrimination on December 24, 1996. She filed her formal complaint on January 16, 1997. The agency dismissed the complaint for failure to file within 15 days of receipt of the notice of the right to file. On appeal, appellant asserted that she was ill during the relevant time period, and that therefore the limitations period should have been tolled. On the grounds that appellant failed to submit any persuasive evidence to support her claim, the Commission decided that she did not justify extending the filing period.

Appellant requested reconsideration and submitted documents showing absences for bronchitis and a viral infection, and accompanying leave requests. The Commission concluded that there was insufficient evidence that appellant was so ill that she was incapacitated and could not send her formal complaint in a timely fashion. Specifically, the Commission noted that documents in the file indicated that appellant was able to return to work on January 3 and 10, 1997. The Commission also observed that the complaint was signed by appellant on January 7, 1997, but that it was not mailed until a week later. Based upon those facts, the Commission determined that there were insufficient grounds upon which to toll the time period for filing appellant's complaint, and affirmed the agency's dismissal of the complaint as untimely filed.

NO EXTENSION OF TIME PERIOD TO FILE APPEAL WHERE NO NEXUS BETWEEN MEDICAL CONDITION AND LATE FILING

Thompson v. Department of the Navy, EEOC Request No. 05960675 (July 11, 1997).

Appellant filed his appeal of an agency's final decision over three months after receiving the decision. His appeal was dismissed by the Commission as untimely. Appellant filed a request to reconsider the dismissal of his appeal, and submitted, for the first time, a medical explanation for his untimely filing. The Commission rejected the explanation. The Commission stated that the explanation for the untimely filing should have been submitted with the initial appeal, not for the first time in the request for reconsideration. The Commission also found the explanation too general, as it showed no nexus between appellant's medical condition and his late filing. The Commission denied reconsideration of

the appeal dismissal.

FAILURE TO READ MATERIALS EXPLAINING LIMITATIONS PERIOD NOT SUFFICIENT TO TOLL TIME TO CONTACT COUNSELOR

Gerolamo v. Department of the Treasury, EEOC Request No. 05970634 (June 12, 1997).

The appellant worked for the agency as a temporary employee from June to September, 1995. In December 1995, he contacted an EEO counselor alleging sexual harassment during his employment with the agency. The agency dismissed the complaint for failure to timely contact an EEO counselor. The agency noted that materials informing the appellant of his EEO rights were distributed when he started working at the agency. In his appeal to the Commission, the appellant stated that he had not read the materials until December 1995, and only then did he become aware of the time limits to seek EEO counseling. The Commission found that the appellant's failure to timely read the materials did not justify a waiver of the time limits for contacting an EEO counselor. The agency's dismissal of the complaint was affirmed.

Severe Depression Sufficient to Toll Time Period to Contact EEO Counselor

Sohal v. United States Postal Service, EEOC Request No. 05970461 (April 24, 1997).

The appellant contacted an EEO counselor on November 22, 1994, concerning an alleged discriminatory incident which occurred on September 14, 1994. The agency dismissed the complaint on the matter for failure to timely contact an EEO counselor. On appeal, the appellant argued that for approximately two months after the discriminatory incident he was very depressed and under the influence of antidepressive medication, and was unable to make any decisions. He submitted evidence from his treating psychologist indicating that, during that time period, he was experiencing severe depression and anxiety as a consequence of the incident in question. The Commission noted that, in cases involving physical or mental health difficulties, an extension of time is warranted only where an individual is so incapacitated by his condition that he is unable to meet the regulatory time limits. In this case, the Commission found, the appellant submitted medical evidence showing that he experienced severe depression beginning on the date of the alleged discriminatory incident. The Commission observed that the medical evidence clearly indicated the negative effect of the appellant's continuous and severe depression, and the medication which he took, on his ability pursue his EEO claim. The appellant's psychologist offered his opinion that, due to these factors, the appellant was unable to contact an EEO counselor during the relevant time period. The Commission found this documentation sufficient to warrant an extension of time to contact an EEO counselor. It vacated the agency's dismissal for failure to timely contact a counselor and remanded the matter for processing.

Limitations Period to File Complaint Tolled for Military Duty

Myrbeck v. Department of Veterans Affairs, EEOC Request No. 05970331 (April 10, 1997).

The appellant received his notice of final interview (NOFI), giving him the right to file a formal complaint of discrimination within 15 days of receipt, on April 12, 1995. He filed his formal complaint on May 3, 1995. The agency dismissed the complaint as untimely.

On appeal to the Commission, the appellant stated that, as a member of the Maine National Guard, he had military orders to travel out of state for medical treatment from April 15 to April 23, 1995. He argued that the time period to file a formal complaint should have been tolled for that time period. The Commission stated that the time period during which a complainant is in active duty status is excluded from the computation of time in determining whether a complaint is timely filed. It found that, because the appellant had military orders to receive medical treatment during the relevant time period, the time for filing his formal complaint should be tolled. The Commission reversed the agency decision and remanded the complaint for processing.

EEO Posters Blocked From View Warrant Extension of Filing Deadline

Mower v. United States Postal Service, EEOC Request No. 05960153 (July 19, 1996).

When appellant did not contact an EEO Counselor regarding an agency act until more than four months after the act, the agency dismissed the complaint for untimely Counselor contact. Appellant contended that his view of EEO posters containing the notice of filing deadlines was blocked by boxes of supplies and equipment stacked in front of the posters, and that his view was further impeded because the posters were displayed in a poorly lit area. Based on appellant's contention, and on the fact that the agency did not deny or controvert his contention, the Commission ordered the agency to accept appellant's complaint for processing. The agency was reminded that it has a duty to publicize the time limits for contacting an EEO Counselor and to permanently post these time limits. A notice with an obstructed view, the Commission concluded, does not meet this requirement.

Limitations Period for Initiating Complaint May Be Tolled Where Agency Misleads Complainant Regarding the Need to Take Action

Arino v. Social Security Administration, EEOC Request No. 05950541 (June 13, 1996).

Appellant contacted the agency's regional EEO office in October of 1993, seeking to file a complaint with regard to an allegedly adverse personnel action that took place on September 20, 1993. He filed a grievance rather than an EEO complaint because an official in the EEO office advised him that he could not file an EEO complaint, since the responsible official was of the same national origin as he. He contacted a second EEO counselor in May of 1994, and filed a formal complaint three months later. The agency dismissed the complaint on the grounds that appellant failed to contact an EEO counselor in a timely manner.

The Commission stated that, although complainants are generally required to contact an EEO

counselor within 45 days of the alleged discriminatory personnel action, the time limit may be extended under the doctrine of equitable tolling. Specifically, the Commission emphasized that the time limit may be suspended where the agency lulls the complainant into taking no action or actively misleads or prevents the complainant from asserting his rights. Here, the Commission found that appellant was misled by an individual in the regional EEO office into thinking that he could not file a complaint against the agency. The Commission found this to be sufficient justification for extending the time limit under the equitable tolling doctrine and ordered the agency to process the complaint.

7. CONTINUING VIOLATIONS

Continuing Violation Adequately Alleged

Martinez v. Department of Defense, Defense Logistics Agency, EEOC Request No. 05950499 (August 1, 1996).

Five nonselection, two occurring in June 1993 and three in October 1993, were challenged by appellant when he first contacted an EEO Counselor in October of 1993. The agency dismissed the allegations pertaining to the June nonselection on the grounds of untimely contact with the Counselor. In his complaint, and in a subsequent affidavit, appellant asserted that after the last nonselection he believed that he was subjected to "ongoing discrimination" by his supervisor. The agency, in response to appellant's appeal, argued that appellant did not raise a continuing violation.

The Commission ruled that all of the nonselection allegations were timely under the continuing violation theory. It pointed to the fact that appellant alleged that all of the nonselection involved the same type of discrimination, were by the same selecting official, and that the acts were recurring in nature. Moreover, the Commission saw nothing in the record to suggest that appellant was able to perceive any overall pattern of discrimination prior to October 1993. It noted that it is the awareness of the pattern of alleged discrimination, not the nonselection itself, which is dispositive. The Commission reversed the agency's dismissal, and remanded the dismissed allegations for processing.

Allegations of Repeated Nonselection over Several Years Found to Constitute Continuing Violation

Pham v. United States Postal Service, EEOC Request No. 05950385 (August 17, 1995).

Appellant, a part-time flexible clerk, filed a complaint of discrimination on multiple bases in which she alleged that the agency denied her employment, wages and benefits, including seniority, by repeatedly not selecting her for full-time employment, while persons with lower register scores were hired and converted to full-time positions. The agency rejected her complaint, stating that she became aware of the alleged discriminatory personnel actions on November 14, 1992, but did not contact an EEO counselor until April 6, 1994.

The Commission stated that if at least one of the acts complained of falls within the 45-day time limit for contacting an EEO counselor, then a complaint filed at any time within this period is timely filed with respect to all acts which are part of a continuing violation. It also stated that an essential ingredient of a continuing violation is an analogous theme uniting the timely and untimely acts of alleged discrimination into a continuous pattern. In the present case, the Commission found that appellant set forth an allegation of discrimination in March of 1994 that was timely with respect to the counselor contact in April of 1994. It also found that an analogous theme of race, sex and national origin discrimination was evident in appellant's allegations that she had been passed over for full-time status on numerous occasions while applicants with lower test scores were hired. Having concluded that appellant presented a continuing violation, the Commission directed the agency to process her complaint.

Continuing Violation Not Found

Farrell v. Social Security Administration, EEOC Request No. 05940981 (August 3, 1995).

Appellant filed a complaint in which he set forth five allegations of discrimination on the bases of age and sex. These allegations related to his requests for equipment, his exclusion from the best-qualified list for a 120-day position, his performance ratings in the years 1988 through 1992 and several nonselection for the GS-13 level in 1990. He first sought counseling in June 1993. The agency accepted the first two allegations but rejected the rest on the grounds that he failed to timely contact an EEO counselor.

Appellant argued that all of his allegations were timely under a continuing violation theory. In support of his continuing violation claim, appellant argued that the agency's allegedly discriminatory acts were designed to pressure him to retire so that a female could be placed in his job. The Commission found that appellant's allegations did not constitute a continuing violation. It stated that the essential ingredient of a continuing violation claim is an analogous theme uniting the various acts into a continuous pattern. It also stated that factors to look for include whether the same officials were involved in the adverse actions, whether the incidents were of a similar nature, and whether appellant had prior knowledge or suspicion of discrimination as well as the effect of that knowledge.

The Commission found that appellant failed to show that the actions in the five allegations related to a single purpose. The Commission noted that although appellant identified the same three managerial officials as being responsible for the alleged acts of discrimination, the acts complained of were separate and discrete. In particular, the Commission noted that the nonselection allegations were unrelated to the performance appraisal, equipment and temporary position allegations. The Commission concluded that no continuing violation existed with respect to appellant's claim.

8. REMEDIES

USE OF AFTER-ACQUIRED EVIDENCE TO LIMIT APPELLANT'S REMEDY

Martindale v. Department of Veterans Affairs, EEOC Appeal No. 01954423 (December 9, 1997).

In a final decision, the agency ruled that appellant was discriminated against on the basis of his disability (alcoholism) when he was terminated during his probationary period. Back pay was awarded. However, the agency limited the back pay to two weeks based on the results of the background investigation conducted in connection with his hire. The investigation revealed that appellant had a criminal conviction and was on probation. He had not admitted to these facts on his application for employment. The agency's personnel officer stated that he would have recommended termination for falsifying the employment application, based on appellant's nondisclosure alone.

The Commission noted that where a termination is found to be discriminatory, the remedy generally includes reinstatement and back pay. In this case, the agency sought to limit the remedy based on evidence acquired after appellant's removal. The Commission accepted this fashioning of a remedy, since the agency had shown that appellant's wrongdoing was so severe that he would have been terminated on the basis of the wrongdoing alone. The Commission affirmed the agency's limitation of the remedy.

PROPER METHOD DISCUSSED FOR CALCULATING REMEDY OF OVERTIME

Zito v. Social Security Administration, EEOC Petition No. 04970012 (October 9, 1997).

The agency decided that petitioner was discriminated against on the bases of race, sex, and age when he was not selected to be a GS-9 Claims Examiner/Authorizer, and agreed to retroactively promote him to the position and provide all other attendant benefits. The Commission addressed the propriety of the remedies in an earlier appeal decision and, among other things, found that the agency did not correctly calculate the amount of overtime due petitioner. The Commission stated that the agency should have examined the amount of overtime worked by the selectees. The agency was directed to conduct a supplemental investigation on the overtime matter. Thereafter, petitioner argued in this petition for enforcement that the agency did not use the overtime calculation method directed by the Commission. Petitioner contended that rather than using the average number of overtime hours actually worked by the selectees, the agency should have used the amount of overtime the selectees had the opportunity to work. Meanwhile, the agency submitted a compliance report to the Commission showing the total overtime hours actually worked by the selectees during the relevant time period and the average of those hours, and also showing that petitioner was paid an award of overtime pay based upon the average.

The Commission found petitioner's contention unpersuasive. The Commission reasoned that in its earlier appeal decision, it specifically referred to amount of overtime worked, and cited to previous Commission decisions directing that calculations be based on average overtime actually worked by similarly situated employees. The Commission, concluding that the agency complied with its Order, denied the petition for enforcement.

APPELLANT'S PAY REMEDY DETERMINED BY HER REPLACEMENT'S PAY

Cooper v. United States Postal Service, EEOC Petition No. 04970015 (October 9, 1997).

The Commission had previously decided that petitioner was discriminated against because of her sex when she was reassigned out of an EAS-16 supervisory position and was replaced by a male employee who was then paid at the EAS-17 level. The Commission directed her reinstatement, back pay, and other benefits. In February 1996, the agency reassigned her retroactively and paid her back pay at the EAS-17 level. However, the agency placed her into an EAS-16 level position, and following her placement she continued to be paid at the EAS-16 level. The agency asserted that it no longer had any of the higher level positions available due to an agency restructuring in 1992. Petitioner challenged this assertion, stating that the restructuring did not prevent the agency from paying her replacement at the EAS-17 level from 1992 to 1996.

The Commission agreed, and granted petitioner's petition for enforcement. Reasoning that the agency had presented no evidence demonstrating that it would not have continued to pay the replacement at the higher level after February 1996, or that the circumstances of the position had changed so as to justify a reduction in pay, the Commission concluded that petitioner was entitled to have her pay adjusted to the EAS-17 level. The agency was so ordered.

Appropriate Remedy for Denial of Official Time

Edwards v. United States Postal Service, EEOC Request No. 05950708 (October 31, 1996).

Appellant was not scheduled to work on the day of his hearing on a previous EEO complaint; he had worked a full week prior to that day. He had asked to revise his work schedule in order to be in a pay status on his hearing day, but the agency refused. Appellant filed an EEO complaint on the denial, alleging retaliation. The agency made appellant an offer of full relief which included pay at the "straight time" rate for the hours he was in the hearing. When appellant did not respond, the agency issued a final decision dismissing his complaint. On appeal, the Commission decided that the agency's offer was not full relief because it did not provide appellant time off with pay. The agency requested reconsideration, asserting that giving appellant additional time off with pay would constitute more than make-whole relief.

The Commission decided that the appropriate analysis of this case was whether appellant was entitled to official time, rather than whether the agency's offer constituted full relief. Any retaliatory motive by the agency decision-maker is not relevant, noted the Commission, since an improper denial of official time is a violation of EEOC regulations and can be remedied accordingly. Because appellant had worked a full week before the day of the violation, the appropriate remedy, the Commission concluded, was reimbursement at an overtime rate for the hours of the hearing. The Commission modified its previous decision, reversed the agency's final decision, and the agency was ordered to reimburse appellant at an overtime rate.

Agencies Must Process Claims for Costs Regardless of Whether Claimants Are Represented by Attorneys

Carver v. United States Postal Service, EEOC Petition No. 04950004 (June 19, 1996).

Petitioner prevailed in his complaint of discrimination, in which he alleged that the agency discriminated against him on the basis of disability by not selecting him as a letter carrier. The agency awarded petitioner almost \$200,000 in back pay and benefits. He filed a petition for enforcement in which he contended that he was entitled to additional monetary benefits under the Commission's order for relief. In particular, petitioner claimed that he was entitled to reimbursement for all costs associated with the prosecution of his complaint which had been incurred over the life of the complaint. The agency responded that, since petitioner was not represented by an attorney, he was not entitled to have his representational expenses reimbursed.

The Commission stated that, even though petitioner was not represented by an attorney, he was entitled to reimbursement of all reasonable costs incurred in the course of litigating his own complaint. It emphasized, however, that the party claiming costs has the burden not only to prove that he incurred such costs, but also that those costs were reasonable. The Commission found that, instead of requesting documentation from petitioner to support his claim for costs, the agency dismissed petitioner's claim out of hand merely because he was not represented by a member of the bar. The Commission concluded that the agency erred in doing so, and directed the agency to gather all relevant information from petitioner regarding his claim for costs and to issue a check to petitioner for the appropriate amount.

Commission Orders "Bumping" of Selectee As A Remedy for Discriminatory Nonselection

Myers v. United States Postal Service, EEOC Petition No. 04950028 (May 2, 1996).

Petitioner prevailed in an earlier appeal, in which the Commission found that the agency discriminated against her on the basis of sex by not selecting her for the position of automotive parts storekeeper at one of its vehicle maintenance facilities. As part of the remedy, the Commission ordered the agency to place petitioner in the position retroactive to the date of her nonselection.

After the issuance of the previous decision, the agency reported that it had processed the paperwork for placing petitioner in the position, and had given her the appropriate salary as directed in the decision. However, petitioner continued to perform the duties of her old mailhandler position because the storekeeper position was still occupied by the selectee. The agency then reassigned petitioner to a different position to perform mailhandler duties. The compliance record included a letter to the effect that petitioner would be placed in the storekeeper position as soon as it became vacant.

The Commission initially found that its previous order clearly and unequivocally directed the agency to place petitioner in the storekeeper position. It stated that its own prior decisions and court cases

have recognized "bumping" the original selectee as an equitable remedy for discrimination. It found that the balance of the equities in this case favored petitioner over the selectee, emphasizing that the discriminatory nonselection deprived petitioner of the opportunity to gain storekeeper experience that could qualify her for future promotions. It reiterated that, even though the selectee was not at fault, petitioner's losses as a result of unlawful discrimination were the selectee's gains. The Commission found this situation inequitable and ordered that petitioner be placed in the storekeeper position within ten days of the agency's receipt of its decision.

Annual Leave Awarded Pursuant to Discrimination Finding Must be Computed in Accordance with Regulations Implementing Back Pay Act

Shugars v. United States Postal Service, EEOC Petition No. 04950023 (April 11, 1996).

The Commission found that the agency had discriminated against petitioner on the bases of physical disability and reprisal when it referenced his rehabilitation status and physical restrictions on supervisory evaluations for promotion. Petitioner had applied for fifteen positions since 1989, but was unsuccessful each time. As part of the relief, the Commission ordered the agency to award petitioner the appropriate amount of back pay and other retroactive benefits, including annual leave.

The agency notified the Commission in its compliance report that it would provide petitioner with twenty four hours of annual leave and sixteen hours of sick leave lost when he had been placed on leave without pay in connection with one of the nonselection at issue. Petitioner alleged, however, that the agency had not restored his annual leave, as it had promised to do. The agency responded that, although petitioner was entitled to have twenty-four hours credited to his annual leave account, the agency could not do so under its regulations because petitioner would have almost thirty hours in excess of the maximum number of annual leave hours that an employee is allowed to carry over from one year to the next.

The Commission found that the agency was required to compute the amount of annual leave owed to petitioner in accordance with the procedures set forth in the Back Pay Act implementing regulations set forth at 5 C.F.R. § 550.805(g)(1). That provision gives an employee the opportunity to use excess accumulated annual leave rather than having to forfeit that leave. The Commission advised the agency that the Back Pay Act implementation regulations took precedence over the agency's own regulations, and ordered the agency to restore the twenty-four hours of annual leave at issue.

Victim of Discrimination Entitled to Reimbursement for Health Insurance Premiums Paid to Secure Comparable Coverage as Part of Equitable Relief

Allen v. Department of the Air Force, EEOC Petition No. 04940006 (May 31, 1996).

The Commission issued a decision finding that the agency discriminated against appellant on the basis of perceived physical disability by denying him employment as a woodcrafter. The Commission

ordered the agency to hire petitioner, retroactive to the date of the discriminatory nonselection, and to award petitioner all appropriate back pay and benefits to which he would have been entitled. Petitioner later filed a petition for enforcement, in which he argued that the agency improperly calculated his back pay award. In particular, he took issue with the agency's failure to reimburse him for health insurance premiums that he paid in order to secure coverage during the interim period.

Petitioner presented documentation that he had worked several jobs during the period for which he was to be awarded back pay. He also bought health insurance, for which he paid the premiums out of interim earnings. He claimed that the agency failed to exclude his health insurance premiums from the amount of interim earnings that it deducted from his gross back pay award. The Commission found that the agency should have compensated him for the loss of government-subsidized health insurance coverage by reimbursing him for the premiums he paid to secure comparable coverage during his interim employment. However, the Commission limited the amount of reimbursement to the excess in premium amounts over what he would have paid had been employed in the woodcrafter position he applied for. The Commission directed the agency to include this differential in its recalculation of petitioner's back pay award.

Allegation Of Reprisal in Connection with Implementation of Corrective Order Must be Processed as Separate Complaint

Yu v. United States Postal Service, EEOC Petition No. 04950020 (April 18, 1996).

The Commission found that the agency discriminated against petitioner on the bases of disability and reprisal by denying him a step increase and terminating him. Among the items specified in the Commission's order for relief was a provision directing the agency to ensure that petitioner and similarly situated employees were not subjected to future acts of discrimination or reprisal.

Petitioner filed a petition for enforcement in which he alleged that the agency committed further acts of reprisal in connection with the implementation of the Commission's corrective order. Specifically, he alleged: that the agency denied his request for reinstatement of his health insurance coverage; that the agency tried to force him to work on holidays; that a supervisor made derogatory comments on one of his applications; and that the agency had changed its policy regarding the right of career employees to apply for any position for which they met the qualifications.

The Commission observed that, to the extent that petitioner's allegations of reprisal concerned violations of its previous order, petitioner apparently believed that any subsequent reprisal allegation should have been processed under the provision of the order concerning the agency's duty to prevent future violations. The Commission held, however, that allegations concerning acts of reprisal that violate the provisions of a corrective order must be processed as separate complaints. The Commission pointed out that allowing such allegations to be processed as petitions for enforcement would permit new allegations to be raised without regard to counseling requirements or time limitations. The Commission directed petitioner to seek EEO counseling with regard to any allegations of reprisal arising after its prior order.

Agency Ordered to Reimburse Appellant for Life Insurance Premiums He Paid During Pendency of EEO Complaint

Wrigley v. United States Postal Service, EEOC Petition No. 04950005 (February 15, 1996).

In an earlier decision, the Commission found that the agency had discriminated against petitioner on the basis of disability by forcing him to accept disability retirement in lieu of termination. Petitioner subsequently filed a petition for enforcement of the Commission's order for remedial relief in that decision. One argument raised by petitioner was that the agency should have reimbursed him for all life insurance premiums that he paid out of his own pocket while his complaint was pending.

The Commission stated that life insurance premiums are to be waived for the period during which an employee was wrongfully separated from the federal service and subsequently reinstated. Citing 5 U.S.C. § 8706(d), the Commission held the agency was obligated to reimburse petitioner for any life insurance premiums that he paid as a result of procuring substitute coverage.

Position with Same Series and Grade as Position in Commission Order is "Substantially Equivalent"

Handy v. Department of Transportation, EEOC Petition No. 04950012 (February 23, 1996).

The Commission affirmed an agency finding of discrimination and ordered position of Supervisory Air Traffic Control Specialist, GM-2152-15, or a substantially similar position, retroactive to the date that the selectee began working. The agency submitted documentation indicating that petitioner had been retroactively promoted to the position of Supervisory Air Traffic Control Specialist, GM-2152-15. Petitioner nevertheless filed a petition for enforcement, in which she maintained that the position in which she was placed did not have the same supervisory duties as the one which she was denied due to discrimination.

The Commission stated that a substantially equivalent position is one that is similar in duties, responsibilities and location to the position that petitioner applied for. It also stated that the burden to prove substantial equivalency rests with the agency. The Commission found that the agency met its burden when it submitted documentation of its offers to petitioner of a total of four GM-2152-15 air traffic management positions, and of petitioner's acceptance of one of those positions. Furthermore, the Commission observed that petitioner did not submit any evidence to support her contention that the position that she accepted was not substantially equivalent to the position specified in the Commission's previous order. The Commission therefore denied the petition.

Claimant has Burden to Establish Likelihood of Subsequent Promotions

Ramirez v. United States Postal Service, EEOC Petition No. 04950024 (February 8, 1996).

Petitioner sought enforcement of a previous Commission order directing the agency to retroactively promote him and provide him with appropriate back pay. The Commission found that the agency discriminated against petitioner on the bases of sex and national origin by not promoting him to the position of Account Representative, EAS-15. The agency promoted petitioner to the EAS-15 position, effective December 5, 1987. In his petition, however, petitioner stated that he should have been promoted to EAS-21, since both of the selectees were subsequently promoted to this level. Petitioner provided no documents or calculations to support or further explain his claims. He merely asserted, in general terms, that he had not been afforded all of the relief to which the Commission's finding of discrimination entitled him.

The Commission stated that, in some circumstances, remedial relief may include a subsequent promotion that a complainant would have received had he not been subjected to discrimination. It also stated that where a petitioner asserts that he would have received a further or subsequent promotion, it is his burden to establish the likelihood of that event. The Commission found that promotion above EAS-15 was not automatic and was based on merit selection in competition with other candidates. It stated that awarding an additional promotion to petitioner would be too speculative a remedy. The Commission concluded that petitioner was properly placed at the EAS-15 level.

9. ATTORNEY'S FEES

CHANGE IN COMMISSION POLICY REGARDING THE ENTITLEMENT TO ATTORNEY'S FEES FOR THE PREPARATION AND LITIGATION OF THE ATTORNEY'S FEE PETITION

*****Black v. Department of the Army, EEOC Request No. 05980390 (December 9, 1998).*****

There has been a change in Commission policy regarding the entitlement to attorney's fees for the preparation and litigation of the attorney's fee petition.

Previously, Commission case law ruled that the hours allowed for preparing and litigating an attorney's fees petition should not exceed 3% of the hours in the main case when the matter is submitted on paper without a hearing, and should not exceed 5% of the hours in the main case when a hearing is necessary. See e.g., Oazei v. Department of the Interior, EEOC Appeal No. 01873357 (May 24, 1988), Bernard v. Department of Veterans Affairs, EEOC Appeal No. 01966861 (July 17, 1998).

In Black v. Department of the Army, EEOC request No. 05960390 (December 9, 1998), the Commission departed from the above line of cases. Instead of using caps, the Commission now uses a "reasonableness standard" when determining an attorney's entitlement to fees for preparing and

litigating a fee petition. The Commission wrote, “ We find that the reasonableness standard is a better approach. The caps represent a mechanized, arbitrary and routine determination for an award of fees and costs and construes too restrictive a view of the appellant’s entitlement. Courts and the Commission demand detailed billing information and extensive documentary and legal support for a fee petition. Also, it is inconsistent to dilute the award of fees and costs by refusing to compensate an attorney for reasonable time spent and costs incurred to establish reasonable fees and costs...”

Attorney's Fee Agreement Sets Upper Limit on Maximum Hourly Rate

Hughes v. United States Postal Service, EEOC Request No. 05950090 (June 7, 1996).

Appellant prevailed on her complaint of sex discrimination in connection with an unsuccessful bid for promotion to supervisor. Her attorney filed a petition for attorney's fees, along with the appropriate supporting documentation. The attorney requested approximately \$20,800, representing 130 hours of work at an hourly rate of \$160. In its final decision, the agency awarded the attorney \$7,890 for 57 hours of work at an hourly rate of \$140. Dissatisfied, the attorney appealed the award to the Commission. Included in the attorney's submissions was a copy of the agreement between appellant and the attorney, under which the attorney agreed to represent her at a rate of \$140 per hour.

The Commission stated that, although a reasonable hourly rate is generally determined by the prevailing market rate in the community, the agency was not required to pay more than the hourly rate contracted for in the agreement of representation between the attorney and her client. It also stated that the attorney must still provide sufficient evidence to show that the hourly rate set forth in the representation agreement is reasonable for the relevant community. The Commission found that the record was insufficient to make a determination as to the number of hours for which the attorney should be compensated at the \$140 per hour rate. It ordered the agency to allow the attorney to submit an amended fee application, along with any additional information needed to support her fee request.

Prevailing Party Includes one who Receives Benefits by Pursuing Breach of Settlement Claim

Martin v. Department of Defense, EEOC Request No. 05940745 (August 24, 1995).

Appellant and the agency entered into an agreement on August 27, 1991, to settle allegations of race (black), sex and age discrimination in a complaint that appellant had previously filed. The agreement provided, in part, that the agency would provide appellant with training appropriate for advancement to the position of cafeteria manager. The agency afforded appellant the opportunity to take correspondence courses through its educational program in November of 1991, but the record did not indicate that any other assignments or on-the-job instruction was offered.

On April 5, 1993, appellant's attorney advised the agency that the selection of a younger white female for the position of cafeteria manager in March of 1993 constituted a breach of the settlement agreement. The Commission found that the agency failed to comply with the agreement in that it

failed to identify appellant's training needs and structure an appropriate training program that would prepare him for promotion to the position of cafeteria manager, notwithstanding the plain language of the agreement that it do so.

On its own motion, the Commission awarded appellant attorney's fees on the grounds that he was a prevailing party with respect to his breach claim. The Commission stated that its regulations provide for an award of attorney's fees in cases brought under Title VII where the complainant is a prevailing party, and that one who obtains the benefits he sought by alleging a breach of a settlement agreement can be a prevailing party. It emphasized that appellant timely claimed that the agency had breached the agreement and, when the agency did not respond, properly filed an appeal and received the relief sought.

10. SETTLEMENT AGREEMENTS

SETTLEMENT INVALID DUE TO AGENCY'S DELAY IN SIGNING

*****Miller v. Department of Health and Human Services, EEOC request No. 05970174 (August 26, 1998)*****

Appellant alleged race, national origin, and age discrimination, as well as reprisal for prior EEO activity, concerning a number of agency actions affecting the terms and conditions of employment. Some of the allegations were resolved in one settlement agreement, and the remaining issues were resolved in a second agreement. Appellant signed the second settlement agreement on March 29, 1995. No agency official, however, immediately signed the second agreement. As a result, on April 6, 1995, appellant filed a formal complaint on the allegations encompassed in the second settlement. On May 22, 1995, an agency official untimely signed the second settlement agreement. The agency thereafter dismissed the complaint as moot. On appeal, the Commission reversed the dismissal on the grounds that prior to the dismissal, appellant had raised a settlement breach allegation, which had never been addressed by the agency. In its subsequent decision on appellant's request to reconsider, the Commission modified the appellate decision. The Commission first pointed out to the agency that the complaint was not moot, as appellant had alleged anxiety and depression as a result of the agency's actions, and had therefore the issue of compensatory damages. The Commission further determined that the second settlement agreement should be set aside. Noting that the agency had failed to sign the second agreement until more than one month after appellant's complaint was filed, and nearly two months after appellant signed the second agreement, the Commission found that the agency's belated signing was merely an attempt to dispose of appellant's complaint. The Commission found that the agency had acted in bad faith in this case due to its delay in signing the agreement. The Commission vacated the agency's dismissal, and remanded the complaint for processing, noting that the parties were free to enter a new and valid settlement agreement if they so desired.

Complainant Alleging Breach of Settlement Agreement Must Observe Relevant Time Limits

Rice v. Department of Veterans Affairs, EEOC Request No. 05950371 (May 9, 1996).

Appellant filed a complaint in which he alleged that the agency discriminated against him on the bases of sex and reprisal by removing him from his position as a registered nurse. The parties entered into a settlement agreement on January 28, 1993, under which the agency agreed to reinstate appellant, effective on February 1, 1993. On August 6, 1993, appellant wrote a letter to the agency's EEO director, alleging that the agency breached the agreement by reassigning him to a facility in a different part of the country upon his reinstatement in February of 1993. Appellant stated that he contacted a counselor at the time of his transfer, and was told by the counselor that such reassignments were in the normal course of his employment. He argued that he did not become aware that his transfer was in violation of the settlement agreement until July of 1993.

The Commission stated that if a complainant believes that the agency has not complied with the terms of a settlement agreement, he must notify the EEO director, in writing, within thirty days of the alleged noncompliance. In this case, the Commission found that appellant did not notify the agency of his breach allegation until six months after his reassignment. The Commission found that the reasons given by appellant regarding his late notification were unsupported by the record. It reiterated that appellant should have raised the issue with the agency within thirty days of when the reassignment took place.

Commission Upholds Validity of Oral Settlement Agreement Subsequently Reduced to Writing

Davis v. Department of Transportation, EEOC Request No. 05950023 (January 26, 1996).

Appellant filed two complaints in which he alleged that the agency discriminated against him on multiple bases when it did not select him for various positions for which he applied. The complaint was investigated and referred to an administrative judge for a hearing. At the hearing, the parties announced that they had settled the complaints, and appellant's attorney read the terms of the settlement agreement into the record. The agency agreed to assign appellant to a GS-13 position, promote him to GS-14 after one year and pay his attorney's fees. The AJ subsequently remanded the matter to the agency indicating that the complaint had been settled.

Several weeks later, the agency transmitted a written document to appellant reflecting the terms of the agreement reached orally at the hearing. Appellant refused to sign the agreement, contesting the agency's version and submitting his own draft, which substantially changed the terms. He also claimed that he was coerced by the agency into accepting the terms of the agreement. The agency shortly afterward closed his complaint, whereupon appellant appealed to the Commission.

The Commission stated that in general, settlement agreements must be in writing and signed by both parties. The Commission noted, however, that it had found settlement agreements to be valid and enforceable when they are entered into orally before an administrative judge, appellant is present, the terms are transcribed by a court reporter, all parties agree to the terms, and the agreement is reduced to writing. The record in this case established that appellant agreed to terms for settlement, and that

the terms were read into the record before an AJ in the presence of appellant. The Commission also found that the specific terms of the settlement agreement were subsequently reduced to writing. It concluded that the agency's decision to close the complaint was proper and upheld that decision.

11. "AGGRIEVED" EMPLOYEE

Standards for Stating a Claim of Harassment

Cobb v. Department of the Treasury, EEOC Request No. 05970077 (March 13, 1997).

At a meeting between union and agency officials, an agency official allegedly called appellant a "troublemaker" and a bad union president. Appellant filed a complaint of disability discrimination and retaliation concerning the comments. The agency dismissed the complaint for failure to state a claim, asserting that appellant had suffered no personal or direct harm as a result of the comments.

On appeal, appellant contended that the comments were intended to harm his reputation, were slander and libel, had done irreparable harm to his chances for advancement, and were evidence of a "pattern of behavior." The Commission stated that it had a "longstanding policy and practice," in deciding whether an appellant's complaint stated a claim of harassment, to first determine whether the appellant's allegations were sufficient to state a hostile or abusive work environment claim. The Commission explained that in deciding whether an allegation states a claim, the allegation must be taken as true, and therefore the proper focus is whether a complainant has alleged that he or she is aggrieved due to an unlawful employment practice. It stated that, in deciding whether a harassment complaint states a hostile or abusive work environment claim, the decision maker must consider all of the alleged harassing incidents and remarks to determine whether the alleged conduct is sufficiently severe or pervasive to alter the conditions of his or her employment.

Applying these principles to appellant's complaint, the Commission found that the alleged remarks made at the meeting were insufficient, without more, to state a claim. The Commission also found that, even if it considered the complaint in light of the allegations in earlier complaints filed by appellant, the complaint allegations were not sufficient to state a claim. The Commission affirmed the agency's dismissal of appellant's complaint.

LOW PERFORMANCE REVIEW STATES A CLAIM

Slesak v. Social Security Administration, EEOC Request No. 05960576 (April 10, 1997).

The appellant filed a complaint alleging discrimination based on age (49), disability (mental), and reprisal when he was subjected to harassment resulting in an unsatisfactory performance review. As relief, he requested compensatory damages. The agency dismissed the complaint as moot, noting that the appellant had since retired. In the alternative, the agency argued that the performance review was the kind of preliminary action which was encompassed by 29 C.F.R. § 1614.107(e), allowing dismissal of proposed actions or preliminary steps to taking personnel actions.

On appeal, the Commission determined that the matter was not moot, since the appellant had made a claim for compensatory damages which had not been properly considered by the agency. In response to the agency's assertion that the performance review was a preliminary action and therefore subject to dismissal, the Commission noted that a record of the appellant's performance review was maintained by the agency, and continued to exist despite the appellant's retirement. The Commission thus rejected the agency's argument that the lowered performance review was merely a preliminary step to taking a personnel action, finding that it constituted a present harm to the appellant. The Commission reversed the agency's dismissal and remanded the complaint for processing.

Hiring Another Employee not Basis for EEO Complaint

Stewart v. Department of the Navy, EEOC Request No. 05950456 (November 7, 1996).

Another employee was assigned to the agency public affairs office where appellant worked as an Editorial Assistant. Appellant charged in her EEO complaint that her position eventually would be abolished because of the new arrival, and that her supervisor took duties away from her and gave them to the new arrival. In its final decision the agency dismissed the allegation because it involved only a possibility of future harm; the change of duties portion of the allegation was not addressed. The Commission agreed that appellant's suspicion of future harm was properly dismissed, but decided that the change of duties charge would state a claim. However, the change of duties portion of the allegation was determined to have been raised with the EEO Counselor in an untimely fashion, and the agency's dismissal was affirmed on that ground.

Warning that Disclosure of Classified Information Might Result in Disciplinary Action Does Not Render Employee Aggrieved

DiMura v. Department of Justice (FBI), EEOC Request No. 05950448 (June 27, 1996).

Appellant filed a complaint in which he alleged that the agency retaliated against him for previous EEO activity by interfering with his right to representation in connection with an internal investigation. Appellant was given a form advising him of certain limitations on the dissemination of sensitive, privileged or classified information. The form indicated that failure to obtain prior authorization for release of such information might result in disciplinary action. Appellant contended that, in issuing this notice, the agency interfered with his right to representation by threatening disciplinary action. The agency dismissed the complaint on the grounds that appellant's receipt of the form in question did not render him an aggrieved employee.

The Commission found that appellant's allegation regarding the warning notice did not state a claim. It found that the main purpose of the form was to remind appellant of his ongoing obligations as an agency employee to provide a procedure by which he could communicate with his representative without divulging sensitive, privileged or classified information. The form indicated possible future sanctions for noncompliance, and therefore was found not to threaten imminent punishment. The Commission affirmed the agency's dismissal of the complaint.

Isolated Comments Without Concrete Action Do Not Render Employee Aggrieved

Backo v. United States Postal Service, EEOC Request No. 05960227 (June 10, 1996).

Appellant, a letter carrier in Cypress, Texas, filed a complaint in which she alleged that the agency discriminated against her on the bases of national origin (British), sex and reprisal by criticizing her British accent. Specifically, she alleged that her supervisor remarked to her, "You are from the Northeast and don't understand how people do things down here." The agency dismissed appellant's complaint on the grounds that she was not an aggrieved employee.

The Commission defined an aggrieved employee as one who had suffered a present harm or loss with respect to a term, condition or privilege of employment. It also emphasized that a remark or comment unaccompanied by a concrete action is not a direct and personal deprivation sufficient to render an individual aggrieved. In this case, the Commission found that the supervisor's remarks about appellant's accent and her inability to understand the locals were nothing more than isolated comments, and that appellant suffered no loss of benefits, changes in work schedules or any other adverse action. The Commission further noted that the supervisor's conduct was not severe enough to be considered discriminatory harassment. It therefore affirmed the agency's dismissal of the complaint.

Agency's Delay in Submitting Claim to Office of Workers Compensation Programs Constitutes Harm for Purpose of Stating a Claim Under Commission Regulations

Foster v. United States Postal Service, EEOC Request No. 05950693 (May 16, 1996).

Appellant filed a complaint in which she alleged discrimination on the bases of race (Caucasian), color (white), religion (protestant), national origin (American Dutch), sex, age (44), disability (stress) and reprisal (prior EEO activity) with respect to the agency's delay in submitting her claim to the Office of Workers Compensation Programs. She submitted the claim to the agency on December 16, 1993, but was informed that the Office of Workers Compensation Programs did not receive it until March 1, 1994. As relief, appellant sought benefits lost as a result of the delay, with interest. The agency dismissed appellant's complaint for failure to state a claim.

The Commission found appellant to be asserting that the processing of her claim was delayed by the agency's discriminatory failure to act on her application in a timely manner. It found that the alleged intentional delay by the agency in forwarding the necessary form constituted a specific discriminatory action that resulted in harm to her when the receipt of her check was delayed. The fact that appellant requested interest to compensate her for the delay further supported the Commission's finding that appellant did, in fact, state a claim. The Commission ordered the agency to process the allegation in accordance with EEOC regulations.

Increased Supervisory Scrutiny May Reflect Pattern of Discriminatory Harassment

Reda v. United States Postal Service, EEOC Request No. 05950934 (March 7, 1996).

Appellant, a distribution operations supervisor, filed an EEO complaint setting forth three allegations of discrimination on multiple bases. He alleged, among other things, that his second-line supervisor admonished him for not preparing a productivity count report at fifteen-minute intervals. In particular, he alleged that the second-line supervisor permitted other distribution operations supervisors to delegate the productivity count report to clerks but refused to let him delegate this task. He further asserted that this constituted harassment. Appellant had filed twenty-one EEO complaints over a four-year period. Those complaints consisted of allegations of selective disciplinary action and harassment. The agency dismissed the instant complaint for failure to state a claim.

The Commission found the essence of the allegation to be that the second-line supervisor allowed other distribution operations supervisors to delegate productivity reporting, but would not allow him to do the same. The Commission indicated that, although requiring appellant to do the count may constitute an isolated matter consistent with agency policy, singling him out from other distribution operations supervisors for increased scrutiny may in itself constitute a form of harassment. For this reason, the Commission concluded that this allegation was sufficient to state a claim of disparate treatment and ordered the allegation reinstated for further processing.

Progress Reviews and Improvement Plans Not Placed in Personnel File do not Constitute Adverse Action

Jackson v. Central Intelligence Agency, EEOC Request No. 05931177 (June 23, 1994).

The appellant filed an EEO complaint in which she alleged that the agency discriminated against her on the bases of race and sex by placing her on a performance improvement plan. The agency's regulations indicated that an employee's placement on the plan is a preliminary step to taking a personnel action, and as such, could not be recorded in the employee's official personnel folder. The regulations also indicated that if the employee is placed on a plan for a second consecutive year, the agency may select from various administrative actions, including counseling, reassignment, downgrading or termination. The agency dismissed the complaint on the grounds that the matter raised therein was not an adverse personnel action, but was only a preliminary step.

The Commission affirmed the agency's dismissal of the complaint. It indicated that its regulations require the dismissal of complaints that allege discrimination in any preliminary steps that do not, without further action, affect the individual in an adverse or negative manner. Progress reviews were specifically listed as an example of a preliminary step. It also emphasized that steps taken to improve an employee's performance would not constitute adverse actions as long as those steps do not have any present negative impact upon the employee. In this case, the Commission determined, there were no indications that the appellant's placement on a performance improvement plan was made a part of her service record. To the extent that any records were kept, the Commission found, they were not allowed to be seen by anyone outside the career service panel that made the recommendation. The Commission concluded that the appellant was not an aggrieved employee.

Proposed Actions Undertaken to Harass Individuals on Prohibited Bases May be Actionable

Whitfield v. U.S. Postal Service, EEOC Request No. 05940715 (May 25, 1995).

The appellant filed a complaint in which he alleged that his supervisor retaliated against him for previous EEO activity by threatening him with disciplinary action. The agency dismissed the complaint on the grounds that the supervisor had merely proposed to take action against him, and did not actually initiate disciplinary proceedings.

The Commission stated at the outset that proposed actions do not create a direct and personal deprivation which would render an employee aggrieved within the meaning of its regulations. The Commission found, however, that the record was unclear as to whether the appellant was alleging that the proposed actions were a form of harassment by the supervisor. The Commission emphasized that if preliminary steps were taken for the purpose of harassing the appellant for a prohibited reason, then the appellant's complaint could not be dismissed because the act would have already affected the appellant. The Commission remanded the matter for a supplemental investigation concerning the proposed actions, and ordered the agency to provide the appellant an opportunity to clarify his allegations.

12. DIRECT EVIDENCE OF DISCRIMINATION

Direct Evidence of National Origin Discrimination Found

Parvin v. Department of Veterans Affairs, EEOC Request No. 05950017 (June 20, 1996).

Appellant, a physician and chief of a Medical Center Service, complained of several actions taken against him by the new Chief of Staff of the Medical Center. He alleged that the Chief bypassed him, undermined his authority, and gave him a delayed and unfair performance evaluation. Appellant charged that the Chief's actions constituted discrimination on the basis of national origin (Iranian). The evidence showed that the Chief detailed another employee to take over appellant's administrative functions, delayed appellant's performance evaluation for a year, and rated appellant's administrative competence "unsatisfactory" and his personnel qualities "low satisfactory." The Chief viewed appellant's administration of the Service as poor, and stated that he delayed appellant's performance evaluation in order to give appellant a chance to improve. The Chief also made statements under oath regarding appellant's "foreignness," stating among other things that this caused appellant not to be a team player. The Chief also stated that appellant was "kingdom oriented," and that he wanted to run his "kingdom" without any supervision.

The Commission first noted that direct evidence of discrimination could be defined as an action or statement of an employer which reflects a discriminatory or retaliatory attitude, and which correlates to the challenged act. It found that the above-referenced remarks by the Chief reflected a negative

attitude toward appellant's national origin, and that they were linked directly and closely with the actions he took against appellant. The Commission determined that the Chief's statements constituted direct evidence of national origin discrimination. As a result of this finding, the Commission concluded that liability was established.

The Commission also found that there was proof in this case of legitimate motives in addition to the unlawful motive. It decided that the agency would have taken the same actions even if discrimination had not been a factor. The Commission was persuaded by site-visit reports from two persons from other facilities, which established the presence of problems in appellant's Service and corroborated the Chief's contentions that appellant was responsible for the problems. It noted that relief in a mixed motive case such as this is limited, that an employer is not required to pay compensatory damages or back pay or provide reinstatement, although the employer is required to pay appropriate attorney's fees. See Section 107 of the Civil Rights Act of 1991, Pub. L. 102-166, codified at 42 U.S.C. Sections 2000e-2(m), 2000e-5(g)(2)(B). The Commission ordered the agency to post a Notice at the subject Medical Center, and to process appellant's request for attorney's fees.

13. CONSTRUCTIVE DISCHARGE

Working Conditions Must Be Intolerable to Support Constructive Discharge Claim

Walch v. Department of Justice, EEOC Request No. 05940688 (April 13, 1995).

Appellant filed a complaint of discrimination alleging that he was forced to resign from his position as a special agent trainee because of his race. Appellant was informed that he would be dismissed because several female co-workers complained that appellant sexually harassed them. Appellant resigned the following day in lieu of termination.

Appellant maintained that he had been coerced into resigning, and that a reasonable person in his position would have done the same because the pervasiveness of the alleged discriminatory practices. He contended that he had been harassed by instructors since the fourth week of training, that he was forced to pick up ammunition and clean shotguns after class, and that charges of flirting with female trainees were elevated to sexual harassment charges. He also alleged that he was the subject of racial slurs by his classmates.

The Commission stated that in order to substantiate a constructive discharge claim, appellant would have to show that a reasonable person in his position would have found the working conditions intolerable, that conduct constituting discrimination created those working conditions, and that his involuntary resignation resulted from those conditions. It found that appellant failed to show that the working conditions would have been intolerable to a reasonable person. The Commission noted that he presented no evidence to support his allegations other than his own assertions, and therefore affirmed the agency's finding of no discrimination.

14. DISCRIMINATION FOUND

NOT NECESSARY TO SHOW THAT A SIMILARLY SITUATED PERSON WAS TREATED DIFFERENTLY

Saenz v. Department of the Navy, EEOC Request No. 05950927 (January 9, 1998).

The agency rated appellant as “Exceeds Fully Satisfactory” on her 1992 annual performance appraisal. She filed an EEO complaint alleging that she should have received an “Outstanding” rating, and that her given rating was prompted by national origin (Hispanic), sex, and age discrimination and reprisal. A GS-12 Personnel Management Specialist, appellant compared her treatment with a Satellite Branch Manager (Hispanic male) who worked for the agency at another facility. He was rated “Outstanding.” The agency Personnel Director had rated both employees. An EEOC AJ in a recommended decision found no national origin or age discrimination but did find sex discrimination and retaliation. He found that the agency gave the comparison employee credit for work that appellant and her staff performed. In a later appellate decision, the Commission ruled those findings proper.

The agency filed a request to reconsider, arguing that appellant could not establish a *prima facie* case of sex discrimination because she was not similarly situated to the comparison employee, and therefore could not show that she was treated less favorably. The Commission, while recognizing the frequency with which the “similarly situated” standard is used, stated that it is not mandatory for an appellant to follow it. Rather, an appellant must present evidence which would support an inference of discrimination. The Commission found that appellant here was arguing, in essence, a case of “sex-plus” discrimination; that is, the Personnel Director treated her, an Hispanic female, less favorably than he treated non-Hispanic females and all males. Appellant and several other witnesses testified that the Personnel Director treated Hispanic women more harshly than he treated other persons under his supervision. The Commission decided that the testimony supported an inference of discrimination. The Commission went on to decide that the agency’s articulated reasons for appellant’s rating were a pretext for sex discrimination and reprisal. The agency was ordered to raise appellant’s 1992 performance appraisal to “Outstanding,” and to consider the request for compensatory damages that she had raised during the hearing before the AJ.

POSITION RECLASSIFICATION FOUND TO BE RETALIATORY

Coffman v. Department of Veterans Affairs, EEOC Request No. 05960473 (November 20, 1997).

For many years, appellant’s actual duties included media and graphics production, even though her position was classified as a clerical one. She periodically asked for a change in her position description to reflect her actual duties. In 1986 the agency denied her request on the grounds that she did not have the educational background for such a change, whereupon appellant attended and

completed a two-year graphic design program. In 1987, her title was changed to Visual Information Specialist. However, her position description remained the same, showing a grade level of GS-5 and describing clerical duties. Finally, in 1993, the agency issued a new position description. It named appellant's position a Program Assistant GS-5, and restricted appellant to strictly secretarial duties. The record showed that appellant continued to perform graphic work. Appellant filed a complaint asserting that the 1993 position description was an act of retaliation for an earlier complaint she had filed. As corrective action, appellant asked for reinstatement back to the Specialist position with back pay from 1988 at the GS-7 level. After a hearing before an EEOC Administrative Judge (AJ), the AJ issued a decision finding retaliation and recommended the remedy requested by appellant. The agency rejected the AJ's decision and instead found no discrimination.

On appeal, the Commission agreed with the AJ's finding of retaliation and directed the agency to retroactively place appellant in the Specialist position effective on the date in 1993 on which it had reclassified her position. The agency requested reconsideration of the appellate decision. The agency took issue primarily with the factual findings which supported the remedy of retroactive placement in a GS-7 Specialist position. Relying on the Specialist position description, the agency argued that the Specialist position was a GS-5 and comprised clerical duties. The Commission rejected this argument, stating that the position description was not dispositive since appellant's major contention was that the position description was inaccurate. Instead, the Commission credited evidence that the agency promised appellant a career ladder promotion as a Specialist and commended her graphics skills. In addition, the Commission credited evidence showing that appellant's actual duties were "above and beyond" clerical duties.

The agency also challenged the remedy of retroactive placement back to 1987 that the AJ had recommended. For her part, appellant asked for clarification of the remedy of retroactive placement back to 1993 that had been ordered on appeal. The Commission affirmed the propriety of the 1993 date, but clarified the reasons for limiting the remedy to 1993. Although evidence showed that appellant was clearly performing the duties of a GS-7 Specialist from 1988, the evidence did not show that the agency's refusal to award her a GS-7 Specialist position between 1988 and 1993 was because of retaliation. In addition, appellant had not sought to file any EEO complaints on the matter during that period, and the Commission decided that she should have had knowledge or suspicion of retaliation during this period which would have prompted her to file a complaint. The appellate decision was affirmed.

RACE DISCRIMINATION AND REPRISAL FOUND IN NONSELECTION

Robinson v. Department of the Treasury, EEOC Request No. 05950522 (April 24, 1997).

In its previous appellate decision, the Commission found appellant was subjected to race discrimination and reprisal when he was not selected for the position of GS-12 Supervisory Customs Inspector. The agency had asserted that the person selected was the best qualified candidate. The Commission concluded that the agency's reason was pretextual based on several factors, including the findings of the EEOC AJ who conducted a hearing on appellant's complaint. The Commission

found that appellant had more years of relevant experience, and had served as an acting supervisor for more years than the selectee, and also determined that the agency tended to exaggerate the selectee's qualifications while casting a negative light on appellant's. In addition, the Commission based its decision on the testimony of coworkers that the atmosphere at the agency facility was racially tense, and the testimony of appellant's supervisor that the facility director resented the use of the EEO process by appellant and others.

The agency requested reconsideration of the appellate decision and raised numerous arguments, many of which, the Commission stated, had been previously raised on appeal. None of the arguments met the standards for reconsideration. The Commission noted in particular arguments challenging the weight given in the previous decision to the evidence of racial tension that was in the record, including the coworkers' testimony, the dearth of black employees in positions above the GS-11 level, and unrefuted testimony regarding alleged racist remarks and inflammatory display of the confederate flag by one of the members of the panel that considered the qualifications of the applicants. The Commission stated that the previous decision accorded due weight to this evidence. The Commission advised the agency that a request for reconsideration is not the appropriate vehicle for revisiting such holdings, absent an error of material fact or law. The agency's request for reconsideration was denied.

15. OFFERS OF FULL RELIEF

No Full Relief Offers at Hearing Stage

Poirrier v. Department of Veterans Affairs, EEOC Appeal No. 01933308 (May 5, 1994).

The appellant filed six formal complaints of discrimination. The agency rejected some of the complaints and, after investigating the remaining complaints, issued findings of no discrimination. The appellant requested a hearing before an administrative judge in November of 1992. The administrative judge requested that each party provide a statement as to what would constitute full relief with respect to the remaining complaint allegations. In March of 1993, the agency transmitted a settlement agreement, which it had certified as an offer of full relief. The appellant did not respond to the offer. The agency thereupon canceled the appellant's complaints for failure to accept a certified offer of full relief. Citing 29 C.F.R. § 1614.107(h), the Commission stated that a certified offer of full relief must be made before the complainant is provided with the notice required by 29 C.F.R. § 1614.108(f), informing the complainant that the investigation has been completed and that (s)he has the right to a hearing. In this case, the agency issued its certified offer of full relief nearly four months after the appellant had requested a hearing. The Commission concluded that, because the agency tendered its offer outside the appropriate time limits, the agency's cancellation of the appellant's complaint was improper. The Commission added, however, that a respondent, at the hearing stage, may promise in writing to give the complainant a full and complete remedy, as defined by an EEOC administrative judge, and that the administrative judge may then remand the case to the agency to dismiss as moot. Should the agency fail to provide the promised relief, the Commission continued, the complainant could appeal the matter.

16. ABUSE OF ADMINISTRATIVE PROCESS

Commission May Protect Appellate Process from Abuse

Kleinman v. U.S. Postal Service, EEOC Request Nos. 05940579, 05940585, 05940632, 05940723, 05940763 (September 22, 1994).

This decision addressed the appellant's practice of filing multiple appeals and requests for reconsideration on matters far removed from employment discrimination allegations. The appellant had filed 47 appeals and 17 requests for reconsideration since June of 1991. Six of those requests had been filed since October of 1993, of which five were at issue herein. All of the issues raised in the appellant's appeals and requests pertained to the processing of his complaints.

The Commission stated that, in the administrative process established for EEO complaints, abuse of process can be defined as a clear pattern of misuse of the process for ends other than that which it was designed to accomplish. The Commission stated that the use of the EEO process to achieve non-employment-related ends constitutes an abuse of this process. It emphasized that although its regulations do not explicitly provide for sanctioning individuals who abuse the EEO process, it nevertheless has the inherent right, power and obligation to prevent such abuse. It also emphasized that because of the strong policy in favor of preserving a complainant's EEO rights, the circumstances under which abuse of process can be found must be exceptional. The number of cases filed is not dispositive of whether an individual is abusing the process. More significant are the issues raised at the agency level and before the Commission. Finally, the Commission indicated that summary dismissal of appeals and requests for reconsideration would be an appropriate sanction.

In the present case, the Commission noted that the issues raised by the appellant included allegations concerning improper complaint processing. It noted that although those matters were so far removed from the purpose of federal employment law as to suggest a possible abuse of process, it declined to make such a finding, but instead affirmed all decisions to dismiss those complaints which failed to state a claim, whether entered by the Commission in its previous decision or by the agency.

Commission Finds Abuse of Process

Hooks v. United States Postal Service, EEOC Appeal No. 01953852, et al. (November 28, 1995).

Appellant filed 132 complaints in which she alleged that the agency retaliated against her for previous EEO activity. The agency dismissed her complaints on the grounds that she failed to state a claim. Appellant thereupon filed an appeal on each of the dismissed complaints.

The Commission stated that it has the inherent power to control and prevent abuse of its orders or processes and its procedures. It also stated that occasions in which abuse of process standards should be applied should be rare because of the strong public policy in favor of preserving a complainant's

EEO rights whenever possible. It defined abuse of process as a clear pattern of misuse of the administrative process for ends other than that which it was designed to accomplish.

The Commission found that in filing her 132 complaints, appellant had pursued a scheme involving the misuse and misapplication of the EEO administrative process. It found numerous instances in which appellant presented frivolous issues, many of which were similar or identical to those in previously filed complaints. In particular, the Commission noted that 86 appeals were filed in a single day. It found that appellant had blatantly overburdened the administrative system in a manner that reflected a concerted attempt to retaliate against the agency's in-house administrative machinery. The Commission stated that it could not permit an individual to circumvent the administrative process or overburden the system, which was designed to protect innocent individuals from discriminatory practices. It declined, therefore, to entertain the appeals any further, and affirmed the agency's dismissal of the appellant's complaints. The Commission emphasized, however, that this decision is not to be construed as a holding that the mere filing of numerous complaints constitutes an abuse of process, and added that the decision did not deprive nor diminish appellant's right to file a civil action.

Goatcher v. United States Postal Service, EEOC Request No. 05950557 (October 18, 1996).

In each of the nine EEO complaints addressed in this decision, the appellant alleged retaliation. The Commission determined that the complaints raised frivolous similar or identical allegations. The Commission also took note of appellant's 22 additional appeals and requests to reconsider which had been closed since fiscal year 1995, most having to do with her dissatisfaction with the EEO process. Also noted was the fact that she had 38 complaints pending at the agency level at the time the decision was issued. The Commission viewed appellant's actions as a concerted attempt to retaliate against the agency's in-house administrative machinery. Applying its precedent on abuse of process, the Commission decided that appellant had blatantly overburdened the administrative system for ends other than that which it was designed to accomplish. Appellant's requests to reconsider were denied, and the agency's complaint dismissals were affirmed on appeal. In addition, the Commission stated that pending appeals with similar allegations would be similarly dismissed.

17. EQUAL PAY ACT

Equal Pay Act Claimant May Use Predecessors or Successors as Comparative Employees, but Must Present Evidence of Substantially Equal Work

Johnson v. Department of the Army, EEOC Request No. 05950185 (May 23, 1996).

Appellant filed a complaint in which she alleged that the agency violated the Equal Pay Act (EPA) between May of 1987 and September of 1989 by compensating her at the GS-12 level during that time frame for work performed by male comparatives who were compensated at the GS-13 level. The unit in which appellant worked consisted of three branches. Appellant served as a branch chief during the period in question. In that capacity, she supervised two GS-11 employees. Another

branch was headed by a male GS-12 who supervised six GS-11 employees. A third branch was headed by a male GS-13 who supervised one GS-12 and three GS-11 employees. A fourth branch chief, a male GS-13 who supervised one GS-11 employee, left the agency in 1986. The head of the unit testified that job descriptions were incorrect and that the unit was in the process of being reorganized. He stated that the unit had never been audited for the purpose of preparing or classifying job descriptions. The matter was heard by an administrative judge who issued a recommended finding of no EPA violation. The agency then issued a final decision adopting the judge's recommendation and appellant appealed.

The Commission stated that under the EPA, one may establish a prima facie case of sex-based wage discrimination by showing that she received less pay than a male for substantially equal work that required substantially equal skill, effort and responsibility under similar working conditions. It emphasized that job duties must be closely related or very much alike to be considered substantially equal, and that the primary approach in determining whether jobs are substantially equal is an overall analysis of job content. Once the prima facie case is established, the Commission continued, the agency may avoid liability by proving that differences in pay are appropriate under a seniority, merit or incentive system, or are based on any factor other than sex. Finally, the Commission stated that its regulations allow an EPA complainant to use predecessor or successor employees as comparatives as long as they performed substantially similar work.

The Commission found that the departure of one of the branch chiefs prior to the time during which the violation allegedly took place did not bar the use of that individual as a comparative employee in an EPA claim. However, the Commission also found that the record did not support appellant's effort to use the former supervisor as a comparative in order to establish a prima facie EPA violation. It noted that the record contained little information on that individual prior to his departure, and that there was no information in the record concerning that individual's duties or the skill, effort and responsibility of his supervisory position as compared with appellant's. The Commission also found that two male employees worked as branch chiefs at the GS-12 level. It determined that appellant received the same compensation as two male employees performing the same work, and concluded that the agency did not violate the EPA.

18. DISPARATE IMPACT

Commission Addresses Proper Comparison for Disparate Impact Inquiry

Minton v. Department of Justice, EEOC Request No. 05950616 (April 10, 1996).

Appellant filed an EEO complaint in which he alleged that the agency discriminated against him on the basis of race (black) by finding him ineligible for the position of Paralegal Specialist. The agency investigated the matter and issued a final decision of no discrimination, from which appellant appealed. Appellant brought his complaint under the disparate impact theory of discrimination. He alleged that the agency's practice of limiting the area of consideration to federal employees and

reinstatement eligibles had an adverse impact upon black applicants. Appellant did not present any statistical evidence to support his claim. The agency presented statistics in an attempt to show that blacks as a whole were not under-represented within the federal executive branch and were not under-represented in the greater Houston metropolitan area, where the complaint arose.

The Commission stated that the proper analysis for determining the impact of the challenged practice should have included an analysis of the difference between the appropriate external and internal comparative groups. Specifically, the Commission found that the agency should have examined the census occupation tables put out by the Office of Personnel Management for data concerning paralegal specialists in the external comparative group, which would have been those performing legal assistant work in the Houston metropolitan area. It indicated that, with such comparative data, the agency would then have been able to conduct a statistical analysis to determine whether the proportion of blacks in the external comparative pool was significantly different from the proportion of blacks employed as paralegal specialists by the agency.

The Commission found that the data necessary for performing the necessary statistical analysis was contained in the record. In comparing the external labor market data with the internal work force data, the Commission found that blacks represented eleven percent of the external labor pool and forty-two percent of the internal workforce pool. From this information, the Commission concluded that the agency's practice of not considering candidates for the paralegal specialist position who were neither federal employees nor reinstatement eligibles did not have an adverse impact upon black applicants.

Agency Has Burden to Prove Business Necessity of Policy Found to have Disparate Impact

Arredondo, et al., v. Department of the Air Force, EEOC Petition No. 03950106 (March 1, 1996).

The named petitioner and six others filed separate appeals with the Merit Systems Protection Board alleging that the agency discriminated against them on the basis of national origin (Hispanic) by subjecting them to a reduction-in-force (RIF). They were notified in May of 1994 that they would be separated in accordance with RIF regulations, effective September 30, 1994.

Petitioners pursued their claim under the disparate impact theory of discrimination. During the course of the appeal to the Board, the agency provided statistics indicating that 61% of the employees at the affected facility were Hispanic. The RIF data provided by the agency indicated that over 80% of the employees separated during the RIF were Hispanic. Petitioners alleged that although black employees made up 18% of the work force, less than 8% of those separated employees were African-American.

The Commission noted at the outset that when allegations of discrimination are based on disparate impact, the focus of inquiry becomes the impact of a facially neutral practice or policy on the petitioner's protected classes. It stated that, to establish a prima facie case of disparate impact,

petitioners had to identify the specific practice or policy being challenged; show a statistical disparity; and show that the disparity is linked to the challenged policy or practice. In this case, petitioners identified the challenged policy as the RIF. The Commission found that a statistical disparity existed in that the RIF disproportionately affected Hispanic employees. The Commission further found this sufficient to support a prima facie case of discrimination under the disparate impact theory.

The Commission also stated that, once the employee establishes a prima facie case, the employer has the burden of showing that the challenged practice is job-related for the position in question and is consistent with business necessity. It also stated that, even if the agency satisfied this burden, petitioners might still prevail if they could point to alternative employment practices that would accomplish the same goal with a less adverse impact on their protected class. The Commission found the record insufficient on this issue, particularly with regard to how the agency determined which positions would be eliminated in the RIF. The record indicated that the agency established a RIF task force composed of personnel managers and specialists, but that was all of the evidence available.

The Commission remanded the matter to the Board for the taking of additional evidence on how the agency determined which positions were to be abolished. It indicated that it would review the additional evidence and issue a decision on the merits at that point.

19. CIVIL RIGHTS ACT OF 1991

Mixed-Motive Provisions of CRA of '91 Not Retroactive

Bowman v. U.S. Postal Service, EEOC Request No. 05940198 (July 27, 1995).

The appellant alleged that she was terminated from her position as a letter carrier because of unlawful reprisal for her prior EEO activity. After an investigation and a hearing, the agency issued a decision finding no discrimination, which was appealed to the Commission. The record showed that the appellant had been placed in her position pursuant to a settlement agreement in a prior EEO complaint. The Commission noted that an agency employee charged with providing "on the job" training to the appellant testified at the EEO hearing that he was told that the appellant had a problem at her prior assignment, and that management wanted to terminate her for this reason. The Commission found that the agency officials were aware of the appellant's prior EEO complaint, and concluded that the testimony of her on the job instructor constituted direct evidence of retaliation for her prior EEO activity. The record also showed that the agency had presented other, legitimate reasons for the appellant's removal. Specifically, she had a record of performance problems. Because the case presented both permissible and impermissible factors, the Commission determined that a "mixed motive" analysis was required. Citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), the Commission stated that, where the appellant shows that an impermissible factor played a motivating part in the adverse action, the burden shifts to the agency to show by a preponderance of the evidence that it would have made the same decision in the absence of discrimination. The Commission noted that Section 107 of the Civil Rights Act of 1991 reversed the Price Waterhouse

decision, but, citing the Supreme Court's decision in Landgraf v. USI Film Products, concluded that it would not apply Section 107 of the Act retroactively. Noting that this case involved conduct which occurred prior to the effective date of the Act, the Commission determined that it should apply the Price Waterhouse "mixed motive" analysis as it existed prior to its reversal. In so doing, the Commission found that the agency had met its burden of proving, by a preponderance of the evidence, that even absent the proven unlawful retaliation it would have terminated the appellant due to her documented poor performance. The Commission therefore affirmed the agency's finding of no discrimination.

Interest Provisions of CRA of '91 Not Retroactive

Ramsey v. Department of the Navy, EEOC Request No. 05940658 (July 27, 1995).

The Commission found sex discrimination in a nonselection which occurred in 1990, and ordered retroactive placement in the position and back pay. The Commission noted that interest on back pay was available pursuant to Section 114 of the Civil Rights Act of 1991. It noted, however, that the appellant was not entitled to an interest award prior to the effective date of the Act (November 21, 1991). The Commission based this decision on its stated position that, pursuant to the Supreme Court's decision in Landgraf, the interest provision of Section 114 of the Act (which it found analogous to the compensatory damages provisions for the purposes of retroactivity) may not be applied retroactively to authorize the payment of interest on back pay prior to November 21, 1991. The Commission stated that interest should be available in all Title VII and Rehabilitation Act cases under Section 114 to the extent that the interest accrued after November 21, 1991. The Commission found that such an award of interest would not represent a retroactive application of Section 114 of the Act because the government had been on notice since the effective date of the Act of the requirements of Section 114, and had therefore had an opportunity to make decisions with this potential liability in mind. The Commission concluded that the appellant was entitled to interest on his back pay from November 21, 1991 until the back pay was awarded.

20. CIVIL ACTIONS

Dismissal Requires Civil Action Filed under Statutes Enforced by EEOC

Krumholtz v. Department of Veterans Affairs, EEOC Request No. 05940411 (March 23, 1995).

The appellant filed an administrative EEO complaint in which he alleged that the agency discriminated against him in violation of Title VII and the Rehabilitation Act when he was subjected to various acts of alleged harassment. The agency dismissed the complaint after agency officials became aware that the appellant had filed a civil action. The record revealed that appellant and several other individuals filed suit against the agency alleging violations of the First, Fifth and Fourteenth Amendments to the Constitution, and also 42 U.S.C. §§ 1983 and 1988.

The Commission concluded that the agency erred in dismissing the appellant's complaint. It stated that the filing of a civil action can be grounds for dismissal of an administrative complaint only if the lawsuit was filed under the statutes which it enforces, including Title VII of the Civil Rights Act, the Age Discrimination in Employment Act or Section 501 of the Rehabilitation Act. The Commission found that the civil action was not filed under one of the aforementioned statutes, and accordingly remanded the matter to the agency for further processing.

21. MIXED CASES

DISCRIMINATION CLAIM SHOULD NOT HAVE BEEN STRUCK PRIOR TO MSPB HEARING

Stephens-Jones v. United States Postal Service, EEOC Petition No. 03970089 (November 20, 1997).

When petitioner was demoted, she appealed the demotion to the Merit Systems Protection Board (MSPB), and alleged that she was demoted because of race and age discrimination. Her discrimination claim was rejected during a prehearing conference by the MSPB AJ on the grounds that the employees identified by petitioner as receiving more favorable treatment were not similarly situated employees. At the hearing, petitioner was not allowed to raise the rejected discrimination claim. Petitioner asked the Commission to review the MSPB's decision on her discrimination claim.

The Commission stated that, as a matter of EEO law, it is error for an MSPB AJ to reject a petitioner's discrimination claim prior to the hearing. Noted were both a Commission decision on that point, and an MSPB decision ruling that an AJ may not strike the discrimination claim before a hearing, based on factual determinations. The rejection in this case was based on a factual determination, stated the Commission. The Commission also pointed out that an absence of comparative evidence in a discrimination case may be overcome by other types of evidence that would support an inference of discrimination. Therefore, the Commission referred this case back to the MSPB for the taking of evidence on the discrimination claim, and for subsequent referral back to the Commission for its review.

22. OTHER SIGNIFICANT CASES

THE U.S. SUPREME COURT MAKES A SERIES OF SIGNIFICANT RULINGS IN THE AREA OF SEXUAL HARASSMENT

Same-Sex Harassment is Covered By Title VII:

*****Oncale v. Sundowner Offshore Services, Inc., et. al., 118 S. Ct. 998 (March 4, 1998)*****

In this private sector case, the U.S. Supreme Court held that sexual harassment by persons of one sex against persons of the same sex is actionable under Title VII. Plaintiff, who was employed as one of an eight-man crew on an offshore oil rig, claimed that he was forcibly subjected to sex-related, humiliating actions against him by certain coworkers. He eventually quit, and stated that he did so to avoid being raped or forced to have sex. In an opinion affirmed by the Fifth Circuit, the district court held that a male has no cause of action under Title VII for harassment by male coworkers.

The Supreme Court held that nothing in Title VII necessarily bars a sex discrimination claim merely because the plaintiff and the defendant are of the same sex. The Supreme Court rejected an argument that coverage of same-sex harassment would turn Title VII into a “general civility code” for the workplace. A plaintiff must prove that the conduct at issue was discrimination, because of sex, stated the Court. In addition, the Court noted that Title VII does not reach ordinary socializing, but rather forbids only behavior “so objectively offensive as to alter the ‘conditions’ of the victims employment.” The Supreme Court reversed the judgment below and remanded the case for further processing.

U.S. Supreme Court Sets Out Title VII Standards of Employer Liability For Supervisors’ Conduct in Sexual Harassment Hostile Environment Cases

*****Faragher v. City of Boca Raton, 118 S.Ct. 2275 (June 26, 1998)*****

For five years, plaintiff worked for the city as a lifeguard. After she resigned, she brought an action asserting claims under, among other statutes, Title VII. She alleged that throughout her employment two of her immediate supervisors created a sexually hostile environment for herself and other female lifeguards, repeatedly subjecting them to offensive touching and remarks. The lifeguards worked out of a breach office with the supervisors, and had no contact with more senior managers. The city had adopted a sexual harassment policy during plaintiff’s employ, but it was never disseminated to the lifeguards, or their immediate supervisors. In the five years she worked for the city, plaintiff did not report the supervisors’ conduct to managers above the supervisors in the city government’s chain of command.

Following a bench trial, the district court found that the supervisors’ conduct created an abusive working environment, and further found the city liable for their conduct. When the case reached the 11th Circuit Court of Appeals, the court agreed with the finding of an abusive work environment. However the court overturned the district court’s finding the city was liable for the harassment.

The U.S. Supreme Court granted certiorari of this case to address the divergence among the Court of Appeals on the standards to be used to govern employer liability for hostile environment harassment that is perpetrated by supervisory employees. The Supreme Court observed that courts have consistently held employers liable for harassment by supervisors when the harassment culminates in a tangible employment action—like hiring firing, promotion or compensation. Where the harassment does not result in a tangible employment action, stated the Court, the tradition principles of the law

of agency were relevant in assigning employer liability. The Court in discussing the use of agency law was referring to its guidance in Meritor Savings Bank, FSB v. Vinson, 106 S. Ct. 2399 (1986), and stated that Meritor's statement applying agency law principles "is the foundation on which we build today." The Court stated in sum that there are good reasons for imposing liability on employer's for misuse of supervisory authority, but expressed the necessity to square that rationale with Meritor's holding that an employer is not "automatically" liable.

To counter the risk of automatic liability under these standards, the Court set forth two alternatives for an employee alleging supervisory liability. The first is to require proof that a harassing supervisor affirmatively or actively invoked the employer's authority. However, the Court noted the difficulty in identifying such affirmative uses of power, observing that supervisors do not make speeches threatening sanctions when they are making legitimate exercises of managerial authority, yet every subordinate knows the sanctions exist. After discussing the difficulty in drawing a line between affirmative and explicit uses of power, the Court stated that the parties would be poorly served by this "active-use rule." The Court instead recognized an affirmative defense to liability, even where a supervisor did create the actionable environment. The affirmative defense requires a showing that: (1) the employer exercised reasonable to avoid harassment and to eliminate it when it might occur, and (2) that the complaining employee failed to act with "reasonable care" to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided.

In this case, the Court decided that any avenue to such a defense by the city was closed, noting the city's failure to disseminate its policy against sexual harassment, the city's failure to keep track of supervisors' conduct, and the fact that the city's policy did not include any assurance that a harassing supervisor could be bypassed in registering complaints. The Supreme Court reversed the decision of the circuit court and reinstated the judgment of the district court.

*****Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (June 26, 1998).*****

The plaintiff's second-level supervisor allegedly made repeated boorish and offensive remarks to her during the approximately 14 months she worked for the employer. He also allegedly threatened to deny her tangible job benefits, once stating, after plaintiff gave no encouragement to his sexual remarks, that he could make her life "very hard or very easy." However the supervisor did not carry out any threats against the plaintiff, and indeed she received a promotion while working there. Plaintiff did not inform upper management of the supervisor's conduct during her employ, but did so in explaining the reason for her resignation. She brought an action alleging sexual harassment. Her case reached the U.S. Supreme Court after summary judgment had been granted for the employer, so the court was required to assume for the purposes of its opinion that all of plaintiff's allegations were true.

Because the claim involved only unfulfilled threats, stated the Court, it should be categorized as a hostile work environment claim, which requires a showing of severe or pervasive conduct. The Court stated that the question before it was whether an employer has vicarious liability in such a case. The Court stated that Congress gave an explicit instruction to the Courts to interpret Title VII based on

agency principles, by defining the term “employer” in Title VII to include “agents.” The Court concluded that in applying agency principles, a “uniform and predictable standard must be established as a matter of federal law.” The Court then discussed principles of agency law as applied in the context of employment. The Court stated that it is bound by the holding in Meritor, cited above that agency principles place some limits on the concept of holding employers liable for the acts of employees. Considerations other than agency principles also might be relevant in placing such limits, stated the Court. The Court set out the example of Title VII’s design, which encourages the creation of anti-harassment policies and effective grievance mechanisms. In order to accommodate these considerations, the Court adopted the following holding both in this case and in the Faragher opinion highlighted above:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages...The defense necessarily comprises to necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

118 S.Ct. At 2270. The Court noted that proof of an anti-harassment policy with a complaint procedure is not always required to show the first of the elements, although the need for a stated policy suitable to the employment circumstances may be addressed. The Court also stated that while an employee’s failure to use an employer’s complaint procedure is not the only proof appropriate to show the employee’s failure to avoid harm, the employee’s failure to use the procedure will normally be enough proof to satisfy the employer’s burden under the second element. The Court emphasized, however, that no affirmative defense is available when a supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. The Court reversed the grant of summary judgment, and remanded the case to the district court for trial.

ENFORCE ABILITY OF ARBITRATOR’S DECISION

DiPleco v. United States Postal Service, EEOC Request No. 05980032 (January 30, 1998).

When appellant was placed on emergency suspension because of a report in a newspaper article, she filed a grievance. An arbitrator awarded her appropriate back pay in June 1995. Appellant filed an EEO complaint in September 1996 in which she asserted she had not received her back pay, claiming discrimination on the bases of race (white), religion, sex, disability, and reprisal. The agency dismissed the complaint for failure to state a claim, and the dismissal was affirmed on appeal. In a request to reconsider, appellant stated that the award she received in September 1996 was in error, and that the agency had not yet paid her the correct amount.

The Commission stated that it will review an EEO complaint challenging an arbitration decision in certain circumstances, where there is an allegation of discriminatory administration of an agency's grievance process, or discriminatory implementation of an arbitration award. However, the Commission characterized this request as, in essence, a request to enforce the decision of the arbitrator, and ruled that it was outside the jurisdiction of the Commission. Appellant's request was denied.

Preselection By Itself Insufficient to Prove Discrimination

Nickens v. National Aeronautics and Space Administration, EEOC Request No. 05950329 (February 23, 1996).

Appellant filed a complaint in which he alleged that the agency discriminated against him on the basis of race by not promoting him to a GS-15 managerial accounting position for which he had applied. The agency admitted that it canceled the vacancy because the selecting official knew of a GS-15 at another agency who qualified for the position and who could be laterally transferred into it. It issued a decision acknowledging that appellant had established a prima facie case of race discrimination, but found that he failed to establish that the agency's articulated reason for not selecting him was pretextual.

The Commission stated that, while preselection may serve to discredit the reason given for the selection decision, in the absence of evidence establishing that it was based on a basis prohibited by Title VII, preselection was not, in and of itself, discrimination. The Commission agreed with the agency that the selectee was chosen on the basis of his qualifications for the position, and not upon a prohibited basis. It therefore affirmed the agency's finding of no discrimination.